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EXECUTIVE SUMMARY

When it occurs, a judicial disability has the potential, depending on its nature, to detract seriously from the judiciary's functioning and to erode public confidence in the administration of justice. Judicial disabilities manifest themselves in many ways and, fortunately, have been infrequent. The recommendations for circuit action that the task force makes in this report are, therefore, modest. Statutory changes or new rules of the Judicial Council requiring chief judges to respond to every perceived disability are unwarranted. Rather, the task force concluded that existing problems involve primarily (1) a lack of readily available information and (2) a lack of readily available informal methods of obtaining help. Additionally, the task force concluded that procedures designed to force a disabled judge unwillingly to obtain help would be inappropriate. Issues of judicial disability must be handled in a compassionate and cooperative manner. Moreover, coercive procedures are likely to be less effective than those appealing to the judge's commitment to public service, and the threat of a sanction against a judge (such as removal from office) for refusing to cooperate is inappropriate, especially for Article III judges.

Accordingly, the recommendations of the task force fall into two general categories, which are suggested by our conclusions: education and assistance. Because the identified problems affect all judicial officers in much the same way, the task force concluded that, in general, the same procedures for education and assistance should apply

to all judicial officers. The task force also recommends that the Judicial Council periodically revisit the issues of judicial disability to assess implementation of these recommendations and to determine whether different or additional measures should be introduced.

Overview of Report

The task force learned that, although incidents of judicial disability have been infrequent, statistics suggest that, each year, some judges of the Ninth Circuit likely will be affected by disabling conditions. For example, a large percentage of Article III judges in the Ninth Circuit are 70 years of age and older. The task force learned that 79 percent of persons aged 70 and older have at least one of the following chronic conditions: arthritis, hypertension, heart disease, diabetes, respiratory disease, stroke, or cancer. And, an estimated 25 percent of persons aged 70 and older have Alzheimer's disease.

Disabling conditions may also affect judges under the age of 70. Twenty-two percent of individuals between the ages of 45 and 64 suffer from arthritis, hypertension, heart disease, diabetes, respiratory disease, stroke, or cancer. In addition, a judge of any age may become disabled from other causes, such as an accident.

To understand the issues relating to judicial disabilities, the task force conducted extensive research regarding the problems associated with and caused by common disabilities. The task force heard presentations from an array of experts on specific

¹As of December 31, 1999, 37 percent of the judges were aged 70 or older.

disabilities, and task force members were assigned to speak individually with other experts on disabilities and with persons closely involved with disability-related issues. In addition, the task force reviewed a comprehensive body of literature regarding judicial disabilities and analyzed existing programs from other judiciaries, from state bar associations, and from different industries, including the medical profession. The task force also spoke with several judges who have become disabled.

The experts and those closely involved with disability-related issues were unanimous in their view that a supportive and encouraging response to disability-related matters is essential to dealing effectively with such matters. The task force therefore focused its efforts on developing such a response in the Ninth Circuit. In doing so, the task force considered a wide range of different approaches. For example, the task force considered whether to maintain the circuit's current procedures for responding to judicial disabilities, which provide a very limited response, or whether to develop extensive procedures, such as detailed step-by-step procedures for responding to each disability-related situation. The task force ultimately concluded that the circuit should have more extensive procedures than currently exist to guide judges and the court regarding disability-related issues, but that the procedures should not be too detailed or rigid, because each disability-related situation is likely to pose unique challenges.

A. Statutory Procedures

As part of its study, the task force reviewed and analyzed the relevant statutes and rules. These statutes and rules primarily address two situations: the voluntary retirement of a disabled judge and the involuntary removal of a disabled judge. The task force concluded that, at this time, there is no need to change the statutes or rules. Rather, the task force believes that more information should be provided to judges regarding extant statutory procedures so that judges and their families may make informed decisions should judges become disabled.

The task force therefore makes several recommendations that are intended to disseminate a wide range of helpful information to judges. The task force recommends, for example, that the Administrative Office of the United States Courts complete its planned handbook on disability for use by Article III judges, bankruptcy judges, and magistrate judges who are considering retiring as disabled and that presentations be made periodically at judicial workshops, conferences, and at individual courts regarding disability-related issues.

Other recommendations that the task force makes regarding the statutory procedures for responding to judicial disabilities include requiring medical certification of a judge's disability and encouraging disabled judges to continue working, to the extent that they are willing and able to do so, either as senior judges or as recalled bankruptcy judges or magistrate judges.

The task force also studied the circuit's current system for handling complaints of judicial misconduct and disability. The task force debated whether a separate system or separate procedures should be developed to handle reports of judicial disability. The task force questioned whether the current procedures provide enough support and encouragement to disabled judges. For three reasons, the task force concluded that a separate system for reports of judicial disability is not warranted.

First, there may be situations in which issues of disability and misconduct overlap. Second, separate systems necessarily would require complainants to try to diagnose a judge's conduct to determine which system to use, misconduct or disability. Third, the task force concluded that the current complaint procedures are flexible enough to allow the chief circuit judge, who is responsible for reviewing complaints of misconduct and disability, to resolve a report of judicial disability non-punitively in most cases, by helping the disabled judge retire or obtain treatment.

B. Informal Procedures

In its study of the informal (non-statutory) ways in which the circuit addresses issues of judicial disability, the task force reviewed the current programs available to the judges of the Ninth Circuit. The task force concluded that these programs, which include a federal employee assistance program and various state-run lawyer assistance programs, inadequately address the diverse disability issues facing federal judges, given the unique characteristics of judges and their office. The task force therefore recommends that the

Judicial Council develop an assistance program specifically to address issues of judicial disability in this circuit.

The centerpiece of the assistance program would be a 24-hour private assistance line that would be available to judges, their staffs, and their families for preliminary assessment, intervention, and referral services regarding judges. All communications to and from the private assistance line would be kept confidential, except with the express consent of the particular judge. After studying models from other jurisdictions and other professions, the task force concluded that the private assistance line would be an important resource for the circuit by providing a confidential, non-disciplinary means of assisting disabled judges.

The assistance program also would include a preventive component. The task force believes that judges and their spouses would benefit from periodic presentations at conferences, workshops, and other meetings regarding issues of health and wellness. As the task force learned, there are many steps that judges can take (and should be encouraged to take) to maintain good health. Many of these steps may be unfamiliar to judges, such as the importance of undergoing routine physical and mental examinations. Studies have shown that early diagnosis and treatment of certain diseases, such as Alzheimer's disease, may significantly slow the disease's progression.

- C. Summary of Recommendations
- ! Increase the availability of readily accessible information for judges who are considering voluntary disability retirement, including completion of a disability handbook by the AO and presentations at judicial workshops, conferences, and individual courts.
- Physician-patient privilege in the following situations: (1) when a disabled bankruptcy judge or magistrate judge wishes to retire under the disability statutes, (2) when a bankruptcy judge or magistrate judge, who has retired as disabled, wishes to be recalled for service, (3) when an Article III judge, who has retired as disabled, wishes to be designated for duty as a senior judge, or (4) when a senior Article III judge, who has certified himself or herself as disabled, wishes to continue to be designated for duty as a senior judge.
- ! Develop and promote a 24-hour private assistance line that would be available for use by judges, their families, and their staffs to provide initial assessment, intervention, and referral services regarding judicial disabilities.
- ! Ensure the confidentiality of all communications to and from the private assistance line (except with the express consent of the judge).
- ! Train judges, particularly chief judges, to recognize potential disability-

- related issues and to take appropriate action.
- ! Develop and present educational programs for judges and their spouses regarding issues of health and wellness.
- ! Create a continuity committee to implement the recommendations adopted by the Judicial Council, if any.
- ! Periodically reassess issues of judicial disability and the implementation of the task force's recommendations to determine whether different or additional measures are necessary.

I. INTRODUCTION

A. Charge to the Task Force

Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c) (Act), each circuit's Judicial Council is charged with the responsibility of protecting the quality of the judicial process. The Act provides a mechanism for reviewing allegations that a federal judicial officer "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability." The Judicial Council of the Ninth Circuit carries out this responsibility under its Rules Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules).

In keeping with the Judicial Council's responsibility to safeguard the integrity of and public confidence in the judiciary, the Council appointed a task force to address and improve current judicial disability procedures: the Judicial Disability Task Force of the Ninth Circuit Judicial Council. In appointing the task force, the Council questioned the effectiveness and fairness of the procedures currently in place to address judicial disabilities. The existing procedures appeared unsuited to address many serious disability issues; they were designed primarily as a disciplinary mechanism for judges who allegedly have engaged in misconduct. The Council's interest was sparked by experiences with: (1) judges who wished to take disability retirement but were unsure about the process; (2) chief judges and others who advised the Council that some judges

who had become disabled were unsure about the alternatives available to them; and (3) an increase in the number of judges within the circuit who were dealing with serious health issues.

The Council charged the task force with making recommendations to improve the existing formal procedures and developing informal procedures to respond to judicial disabilities. The mission of the task force was to:

- review and recommend any necessary changes to the Act and the Misconduct Rules;
- make recommendations regarding informal disciplinary and intervention procedures;
- draft informal intervention guidelines;
- study existing formal and informal disability procedures in other jurisdictions;
- create a "disability handbook" for judges;
- develop an Employee Assistance Program (EAP) for judges;
- develop a circuit-wide resource list for judges; and
- publicize existing formal and informal disability procedures to all judges.²
- B. Composition of the Task Force

The chair of the task force is District Judge Judith N. Keep (S.D. Cal.). Other members are Circuit Judge Susan P. Graber, District Judge Vaughn R. Walker (N.D.

²Although this report does not track each of these points in order, each was thoroughly considered by the task force and is discussed in the report.

Cal.), Senior District Judge Spencer M. Williams (N.D. Cal.), Chief Bankruptcy Judge Thomas T. Glover (W.D. Wash.), and Magistrate Judge J. Kelley Arnold (W.D. Wash.). The task force is staffed by Robin Donoghue and Julie Cobb Martel of the Office of the Circuit Executive, and previously was staffed by Laura Ryan of the Office of the Circuit Executive.

C. Methods of Study

The Ninth Circuit is the first federal circuit, and one of the first judicial units, to undertake the task of improving judicial disability procedures. Thus, there were no models from other circuits on which the task force could rely.

The task force extensively researched issues of judicial disability and possible ways to address them. Members of the task force analyzed the controlling statutes, rules, and regulations, read materials from other disability programs, and reviewed a comprehensive body of literature regarding judicial disabilities. Staff surveyed existing programs by contacting other circuits, the American Bar Association, and the bar associations and various commissions on judicial performance for each state in the circuit, as well as some states outside the circuit. Thereafter, the scope of the survey was expanded to include private industry; other professions, primarily the medical profession; and other countries, most notably Canada. Staff also obtained information from the Administrative Office of the United States Courts (AO) concerning its Employee Assistance Program.

The task force heard presentations from experts in the fields of dementia, alcohol and drug abuse, depression, and physical maladies such as stress and heart disease. The task force met with directors of professional assistance programs designed for lawyers, judges, and physicians, and heard from judges who had personal experiences with physical disabilities and substance abuse. Task force members also spoke individually with other experts on disability and with other persons closely involved with disability-related issues. Additionally, the task force heard from the chief of the Judges Compensation and Benefits Branch of the AO.

Finally, the chair solicited comments from the chief district judges and chief bankruptcy judges within the circuit, asking the chief judges to describe any problems that their courts have experienced with judicial disability and to advise the task force regarding what assistance would be most useful to them in addressing such issues.

Although very few respondents had experienced judicial disability within their districts, all were supportive of the task force's efforts. In addition, many of the chief judges said that they would like to have the assistance of a professional from outside the district should such a situation arise.

D. What Makes Federal Judges Unique?

Many of the experts who met with the task force explained that federal judges are a unique professional group. In developing the recommendations detailed in this report, the task force has been mindful of this characteristic in suggesting a program that will best respond to the federal judiciary.

As a group, federal judges are highly intelligent, accustomed to questioning and doubting other professionals (such as expert witnesses), comfortable making decisions, trained to make distinctions, and accustomed to being in control. Because of these attributes, doctors report, federal judges can be difficult patients.

Federal judges are unique even as compared to other judges. For example, Article III judges are distinguished from most state court judges in that they have lifetime tenure. Even bankruptcy judges and magistrate judges, although subject to a reappointment process, do not stand for election. Also, Article III and bankruptcy judges are not subject to any age restrictions.³ And, before appointment, all federal judges go through a rigorous appointment process involving intense public scrutiny. As a result, they may be more inclined to resist further scrutiny once on the bench.

The task force learned that private industry often requires executives to retire between ages 60 and 65. By contrast, as of February 2000, 49 percent of Article III judges in the Ninth Circuit were 65 years of age or older. Nineteen percent were aged 75 and over, and eight percent were aged 85 and over. *See* Appendix A. Typically, federal judges are devoted to public service, and few choose to retire even though they are eligible

³At the time of initial appointment, a magistrate judge must not be 70 years of age or older. *See* Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges § 1.01(e). A magistrate judge may continue to serve and be reappointed after the age of 70, but only upon a majority vote of all the active district judges of the court, which is taken when the magistrate judge turns 70 and upon each anniversary thereafter. *See* 28 U.S.C. § 631(d).

to continue to receive their full salaries after retiring. Most continue to work as senior judges, and many judges over age 65 carry a full caseload. A spokesperson for the AO reported that, as of July 1999, of the 556 Article III judges eligible to retire nationwide, 65 remained active judges maintaining a full case load, 442 took senior status maintaining a partial case load, and only 49 chose to retire. Moreover, the judiciary needs these judges to continue working, because the number of authorized judicial officers has not kept pace with increasing case loads. There also are many judicial vacancies, some of which have existed for several years. Hence, unlike any other professional model that the task force could find, the federal judiciary encourages, and is dependent on, men and women over the age of 65 to handle its crushing caseloads.

Furthermore, federal judges of any age are quite isolated from their former lawyer colleagues and even from each other. In some districts, judges are few in number or are geographically distant from one another. Additionally, decision-making is ultimately a solitary activity. Provisions in the Code of Conduct for United States Judges restrict a judge's ability to discuss his or her work in the broader community and limit opportunities for civic, charitable, and social involvement that are available to other professionals. *See* Code of Conduct Canon 5 (limiting civil and charitable activities); Canon 7 (restricting political activity).

E. Disability Statistics ⁴

The National Center for Health Statistics recently published a book on health and aging in the United States, which includes some startling statistics on the health of our society. Overall, a large percentage of older adults consider themselves to be in "fair or poor" health. For example, 27 percent of persons aged 65 and older reported their health as "fair or poor." This number rose to more than 30 percent in persons 75 years of age and older. *See* E. KRAMAROW ET AL., HEALTH, UNITED STATES, 1999, WITH HEALTH AND AGING CHARTBOOK, 211 (1999) (HEALTH) (based on 1996 statistics).

Among persons aged 70 and older, 79 percent have at least one of the following chronic conditions: arthritis, hypertension, heart disease, diabetes, respiratory disease, stroke, or cancer. *See id.* at 40-41 (defining chronic conditions as "prolonged illnesses that are rarely cured completely"). And, an estimated 25 percent of persons aged 70 and older have Alzheimer's disease. Tessa ten Tusscher, Ph.D., Clinical Psychologist and Dementia Specialist, Presentation to Judicial Disability Task Force (May 20, 1999). Moreover, 22 percent of persons between the ages of 45 and 64 are affected by a chronic condition. *See* HEALTH at 210.

Statistics also show that chronic conditions can have a substantial effect on people's lives. More than 30 percent of persons aged 65-74 report that they suffer from a chronic

⁴The task force did not survey the health of federal judges. However, if federal judges suffer disabilities at roughly the same rate as the general population, one can expect to see similar percentages of disabilities in the population of federal judges as noted in this section.

condition that limits their activities. *See id.* And, 10 percent report that a chronic condition prevents them from performing a major activity. *See id.*

II. DEFINING "DISABILITY" AND THE SCOPE OF THE STUDY

At the outset, the principal challenge facing the task force was to define "disability," because this definition would play a significant role in defining the scope of the task force's undertaking. The AO reported to the task force that its regulations currently contain no definition of "disability." Similarly, there is no definition of "disability" in either the Act or the Misconduct Rules.

Although the Act does not define "disability," it does provide some guidance, at least with respect to Article III judges. Section 372(a) provides that "[a]ny justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service and the President shall, by and with the advice and consent of the Senate, appoint a successor." (Emphasis added.) Section 372(b) provides, in part:

Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit in the case of a circuit or district judge . . . is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. (Emphasis added.)

Thus, section 372(b) suggests that "disability" means the inability to discharge efficiently all the duties of the judge's office by reason of a permanent mental or physical condition.

Likewise, regulations pertaining to bankruptcy judges and magistrate judges suggest the same general standard. Section 1.01(b)(5) of the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Bankruptcy Judges provides that, to be qualified for appointment as a bankruptcy judge, a nominee must "be of sound physical and mental health sufficient to perform the essential duties of the office." (Emphasis added.) Section 1.01(c) of the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges requires that a nominee be "competent to perform the duties of office, . . . emotionally stable [and] in good health." (Emphasis added.)

Although helpful, those materials still left the task force with the need to focus its study. The criteria for disability retirement, including the permanency of the impairing condition, for example, are not necessarily the same as the criteria for informal intervention, which appropriately may be broader. After considerable discussion, the task force adopted this working definition of "disability": "a physical or mental impairment, which may include substance addiction, that renders a judge unable to perform the duties of the office on a full-time basis and that reasonably can be expected to last a significant period of time, at least if left untreated."

This definition is expansive. It covers both physical and mental conditions, or a combination of the two. It covers conditions that may have a "volitional" component (e.g., a crippling injury from engaging in a highly dangerous sport) and those that do not (e.g., a brain tumor). Further, this definition covers conditions that are fixed (e.g., permanent paralysis), degenerative (e.g., Alzheimer's disease), controllable (e.g., diabetes), and curable (e.g., depression).

The task force concluded that it should not make distinctions based on the kind or cause of impairment. Rather, the task force was concerned only with providing guidance to assist judges in addressing disability-related issues by: devising more informal resources for judges; disseminating more information to judges concerning the resources available; and recommending clarifications to statutes and rules, where appropriate. This focus on helping judges to perform effectively and efficiently arises, in turn, from the goal of improving the administration of justice in the Ninth Circuit.

The complex nature of disabilities makes it difficult to formulate procedures for addressing judicial disabilities. The task force observed, for example, that there are at least three ways in which a disability, as defined here, can surface. Each of these ways raises different challenges, which the task force kept in mind when making its recommendations.

First, and most obviously, a disability can surface as just what it is, a disability.

For example, a judge may suffer a stroke and become unable to work. In that kind of

situation, the judge will need easily accessible, straightforward information about disability retirement and other options that may be available short of retirement. The task force's recommendations therefore address the need to clarify and disseminate current policies and procedures.

Second, a disability can manifest itself as substandard performance. For example, lawyers or colleagues may complain when they notice that a judge's work is not getting done, or that it is being done in an unacceptable manner; or the judge may be angry or absent-minded in court, day after day. In that kind of situation, the task force concluded, the chief circuit judge (or his or her designee) should attempt to determine whether the reported conduct is *caused by* a disability, such as substance abuse or dementia. If so, then the judge's conduct no longer should be considered a disciplinary matter (unless either the conduct is so egregious that it also must be viewed as a disciplinary matter⁵ or a judge refuses treatment to address the disability), and the task force recommends a variety of techniques and resources to help the judge recover or retire, whichever is appropriate.

Third, there may be no manifestation at all of a *potential* impairment that could cause a disability later. For instance, a judge may be performing in an outstanding manner, but may need bypass surgery to avoid a heart attack and consequent disability. Or, a judge may be mildly forgetful and still doing his or her job well, but could benefit from treatment to slow the progress of dementia. For this situation, the task force

⁵In those situations, the need to serve and protect the public calls for more than treatment for the judge to improve subsequent behavior.

recommends that each judge be encouraged to have routine physical and mental examinations (e.g., the Mini-Mental Status Examination).

There are several issues that the task force's approach does not address. First, the task force makes no recommendations about a judicial officer's working indefinitely on a part-time basis if he or she has a disability that precludes full-time work. The AO informed the task force that there is no statutory authority to permit a judicial officer to reduce his or her workload to a part-time schedule, except for the statutory provision allowing an Article III judge to be designated for duty as a senior judge. *See* 28 U.S.C. § 294(b).⁶ Additionally, based on the evidence presented to the task force and on its members' own experiences, the task force concluded that the various courts within the circuit now handle the temporary disability of a judge (e.g., when the judge is recovering from surgery) effectively by such means as informally reassigning cases.

Second, the task force makes no recommendations concerning the reasonable accommodation of disabilities, nor does this report analyze any pertinent legal requirements for such accommodations. Those topics are beyond the scope of the charge to the task force. Moreover, the question of accommodation is too individualized to be appropriate for general study.

Third, the task force leaves the details of treatment options for future development.

⁶Although 28 U.S.C. § 631(e) authorizes the appointment of a part-time magistrate judge for a period of four years, there is no provision that authorizes a full-time bankruptcy judge or magistrate judge to work part-time. By regulation, however, a recalled bankruptcy judge or magistrate judge may serve on a less than full-time basis.

Unless and until the task force's general approaches are adopted, that level of detail is premature.

Fourth, the task force makes no recommendations concerning the disciplinary process itself, except insofar as a disability may manifest itself as misconduct. Again, that topic is beyond the scope of the task force's charge.

III. STATUTORY PROCEDURES FOR RESPONDING TO PERCEIVED JUDICIAL DISABILITY

This section of the report outlines the current statutory procedures for responding to a situation in which an Article III judge, bankruptcy judge, or magistrate judge becomes disabled,⁷ and the effect of that disability on the judge's salary and benefits. The response may be either voluntary or involuntary on the part of the disabled judge. In the former situation, a judge may voluntarily certify himself or herself as disabled and retire from office. In the latter situation, the Judicial Council may be required to certify the judge as disabled (in the case of a disabled Article III judge) or remove the judge from office (in the case of a disabled bankruptcy judge or magistrate judge).

⁷All references to a "disabled" judge assume that the judge satisfies the definition of "disabled" adopted by the task force, meaning that the judge is suffering from a physical or mental impairment, which may include substance addiction, that renders the judge unable to perform the duties of the office on a full-time basis and that reasonably can be expected to last a significant period of time, at least if left untreated.

A. Voluntary Disability Certification and Retirement

1. Current Procedures

a. Article III Judges 8

An Article III judge may voluntarily retire as disabled by certifying himself or herself as disabled under 28 U.S.C. § 372(a). To do so, the judge must submit to the President a certificate of disability signed by the chief judge of the circuit. (If the chief judge of the circuit is voluntarily retiring as disabled, the certificate of disability must be signed by the Chief Justice of the United States.) An Article III judge who retires as disabled is essentially taking senior status and, when designated to do so by the chief judge, the Judicial Council, or the Chief Justice, may perform "such judicial duties as he is willing and able to undertake." 28 U.S.C. § 294(b).

An Article III judge who voluntarily retires as disabled under section 372(a) will continue to receive for life a salary (in the form of an annuity) based on the judge's length of service. A judge who has served ten years or more will receive the full salary of the office, meaning that the judge will continue to receive salary increases and cost-of-living adjustments. *See* 28 U.S.C. § 372(a); *see also* 28 U.S.C. § 371(f)(1)(E). The judge will

⁸These procedures are summarized in the chart located at Appendix C, "When An Article III Judge Becomes Disabled."

⁹The task force has drafted a model Certificate of Disability. *See* Appendix B (model certificates of disability for use when an Article III judge, bankruptcy judge, or magistrate judge retires as disabled).

receive this salary regardless of the caseload, if any, that he or she handles. ¹⁰ *See id.* The judge will not, however, receive "locality" pay or "post differential" pay. *See*ADMINISTRATIVE OFFICE OF THE U.S. COURTS, SENIOR STATUS AND RETIREMENT FOR

ARTICLE III JUDGES 8 (1999) (SENIOR STATUS).

A judge who has served less than ten years will continue to receive 50 percent of the salary of the office upon disability retirement. *See* 28 U.S.C. § 372(a). Again, this is without regard to the case load, if any, that the judge handles. *See id*.

An Article III judge who has voluntarily retired as disabled will continue to receive those health benefits that the judge elected to receive while in office, as long as the judge was enrolled in the health benefits program for at least five years before retirement. *See* SENIOR STATUS at 40. Additionally, the judge will continue to be eligible to participate in the federal life insurance program if the judge elected to participate while in office. However, because the life insurance benefit is tied to the judge's salary, the benefit will be reduced by 50 percent if the judge has served less than 10 years. *See id.* at 35-36. Further, although the judge no longer is eligible to participate in the Thrift Savings Plan, the judge may continue to participate in the Judicial Survivor's Annuities System and the Long-Term Care Insurance program¹¹ if the judge elected to participate while in office.

¹⁰In this respect, a judge who voluntarily retires as disabled differs from a senior judge. A senior judge must satisfy certain workload requirements in order to be eligible for salary increases (but not cost-of-living adjustments). *See* 28 U.S.C. § 371(b)(1), (f).

¹¹The Long-Term Care Insurance program is a new benefits initiative for employees of the federal judiciary. The first open enrollment period occurred at the end

See id. at 23.

If the judge does not wish to certify himself or herself as disabled, and if the judge is otherwise eligible to retire (that is, if the judge has served 10 years and satisfies the "rule of 80"), the judge may elect to retire from office (28 U.S.C. § 371(a)) or to retire in senior status (28 U.S.C. § 371(b)). A judge who retires from office will continue to receive for life the salary that the judge received immediately before leaving office. The judge will not, however, receive any future cost-of-living increases or other salary adjustments. A judge who retires in senior status will continue to receive the full salary of the office at the time of retirement, plus any cost-of-living adjustments. Subject to workload certification requirements of 28 U.S.C. § 371(f), the judge also will be entitled to any salary increases of the office.¹²

b. Bankruptcy Judges and Magistrate Judges 13

Unlike 28 U.S.C. § 372(a) for Article III judges, there is no comparable statutory

of 1999. During future open enrollment periods, the dates of which have not yet been determined, employees of the judiciary, including all federal judges, may continue to enroll without providing evidence of insurability.

¹²One way in which a senior judge may satisfy the workload requirements of 28 U.S.C. § 371(f), and thus continue to receive the full salary of the office regardless of the judge's workload, is for the judge to certify in writing to the chief judge of the circuit that he or she was unable in the preceding calendar year to perform judicial or administrative work to the extent required because of a temporary or permanent disability. *See* 28 U.S.C. § 371(f)(1)(E).

¹³These procedures are summarized in two charts: "When A Bankruptcy Judge Becomes Disabled" (Appendix D) and "When A Magistrate Judge Becomes Disabled" (Appendix E).

provision expressly providing that bankruptcy judges and magistrate judges may voluntarily retire as disabled. However, it is clear from the statutes governing the retirement of bankruptcy judges and magistrate judges that disability retirement is permitted. For example, 28 U.S.C. § 377(d), which addresses retirement benefits for bankruptcy judges and magistrate judges under the Judicial Retirement System (JRS), refers to a judge who "retires or is removed from office upon the sole ground of mental or physical disability." And, in practice, the various circuits and the AO have recognized the ability of a bankruptcy judge or magistrate judge to retire as disabled.

A bankruptcy judge or magistrate judge who seeks to retire as disabled under JRS must certify in writing to the chief circuit judge (in the case of a bankruptcy judge) or to the chief district judge (in the case of a magistrate judge) that "he or she is permanently disabled from performing the duties of the office." REGULATIONS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE IMPLEMENTING THE RETIREMENT AND SURVIVORS' ANNUITIES FOR BANKRUPTCY JUDGES AND MAGISTRATE JUDGES ACT OF 1988 (DIRECTOR'S REGULATIONS), § 7.01(c). In addition, the judge must submit documentation supporting his or her claim of disability. *See id*.

The chief judge must send a copy of the certification, along with the supporting documentation, to the Director of the AO. *See id.* The chief judge also must make a recommendation to the Director regarding the judge's claim of permanent disability. *See id.* The Director is responsible for determining the judge's eligibility to retire as disabled.

See id. In making that determination, the Director may "order or direct such medical or other examinations as the Director deems necessary to determine the facts relative to the nature and degree of disability, and may suspend or deny a disability annuity for failure to submit to any such examination." *Id.* at § 7.01(c)(2).

The salary and benefits that a bankruptcy judge or magistrate judge who retires as disabled will continue to receive (in the form of an annuity) depends on the retirement plan that the judge selected while in office and the length of the judge's service. For example, if a judge elected to participate in JRS and served at least 5 years, the judge will continue to receive 40 percent of his or her salary. See 28 U.S.C. § 377(d). The judge also is entitled to annual cost-of-living increases, but in no case may the judge receive an annuity that is higher than the salary of an active bankruptcy judge or magistrate judge. See 28 U.S.C. § 377(e). If a judge participated in JRS and served between 10 and 14 years, the judge will continue to receive between 72 and 93 percent of his or her full salary. See 28 U.S.C. § 377(d). Again, the judge is entitled to cost-of-living increases, but in no case may the judge receive an annuity that is higher than the salary of an active bankruptcy judge or magistrate judge. See 28 U.S.C. § 377(e). Finally, if a judge participated in JRS and served 14 years or more, the judge will continue to receive his or her full salary, including cost-of-living adjustments, but may not receive an annuity that is higher than the salary of an active bankruptcy judge or magistrate judge. Thus, a bankruptcy judge or magistrate judge who has served 14 years or more will receive a

cost-of-living adjustment only if the current salary for bankruptcy judges and magistrate judges is raised. For a more complete discussion of how the disability retirement benefits of a bankruptcy judge or magistrate judge participating in JRS are calculated, see ADMINISTRATIVE OFFICE OF THE US COURTS, RETIREMENT BENEFITS FOR BANKRUPTCY JUDGES AND MAGISTRATE JUDGES (RETIREMENT BENEFITS) 41 (2d ed. 1995).

A disabled bankruptcy judge or magistrate judge may also be eligible to retire under JRS based on years of service. 28 U.S.C. § 377(a) provides that a bankruptcy judge or magistrate judge who has served at least 14 years may retire upon reaching age 65. A judge who retires based on years of service will receive an annuity equal to the salary that the judge earned at the time of retirement, including cost-of-living adjustments. *See* 28 U.S.C. § 377(a).

A bankruptcy judge or magistrate judge who participates in the Civil Service Retirement System (CSRS) and elects to retire as disabled must certify himself or herself as disabled to the Office of Personnel Management (OPM), which administers CSRS. See Office of Personnel Management, Disability Retirement Under the Civil Service Retirement System (1995). To be entitled to disability retirement benefits under CSRS (in the form of an annuity), the bankruptcy judge or magistrate judge must have five years of creditable civil service, which can be in positions other than as a judge. See Senior Status at 56. The amount of the disability annuity is based on the length of the judge's service and the judge's highest annual salary for any three consecutive years of

service. For a more complete discussion of how the disability retirement benefits of a bankruptcy judge or magistrate judge participating in CSRS are calculated, see RETIREMENT BENEFITS at 15.

A bankruptcy judge or magistrate judge who retires as disabled and who participated in the Federal Employees' Retirement System (FERS) is entitled to a disability annuity if the judge served at least 18 months. The annuity is calculated based on the judge's age and the judge's highest average annual salary, and it decreases after the first year of disability. For a full discussion of how the disability retirement benefits of a bankruptcy judge or magistrate judge participating in FERS are calculated, see RETIREMENT BENEFITS at 26.

2. Findings, Conclusions, and Recommendations for Change

The task force identified several shortcomings in the current procedures for voluntary disability retirement. These shortcomings and the task force's recommendations for change are detailed below. All recommendations are intended to be applied prospectively only.

a. Lack of Available Information

The task force concluded that a significant problem with the current procedures for voluntary disability retirement is the absence of a readily available source of complete information for those judges who are contemplating voluntary disability retirement.

Accordingly, the task force makes the following recommendations, which are designed to increase the availability of information.

- PRECOMMENDATION NO. 1: The task force recommends that the AO complete its planned handbook on disability for use by Article III judges, bankruptcy judges, and magistrate judges who are contemplating voluntary disability retirement. The handbook should be available in print and on the intranet, including J-Net. It should include such basic information as whom the judge should contact and what forms the judge must complete. Other important information that should be included is a description of the salary and benefits, if any, that the judge will continue to receive. The handbook also should direct any judge who is considering disability retirement to contact the appropriate Circuit Executive to determine whether there are any unique requirements in the circuit.
- ! RECOMMENDATION NO. 2: The section of this report that discusses voluntary disability retirement (Section III.A.1) should be posted on the circuit's intranet site. Judges should be notified that this discussion is a good starting point for any judge who is considering voluntary disability retirement.
- ! RECOMMENDATION NO. 3: All judges who are contemplating voluntary disability retirement should be advised, either by their own chief judge or by circuit personnel, to contact the chief of the Judges Compensation and Benefits Branch of the AO regarding retirement benefits

- before taking any steps to implement voluntary disability retirement. It is imperative that a judge have appropriate benefit selections in place before retirement, because options are severely restricted after retirement.
- ! RECOMMENDATION NO. 4: Judges and their staffs should be encouraged to contact the chief of the Judges Compensation and Benefits Branch of the AO to discuss any options that may be available to a disabled judge, such as special equipment or transportation, that may enable the judge to continue working.
- ! RECOMMENDATION NO. 5: The Judges Compensation and Benefits

 Branch of the AO should continue its periodic practice of profiling the

 retirement benefits of each judge during judicial conferences and then

 meeting individually with the judges and their spouses to go over those

 profiles.
- ! RECOMMENDATION NO. 6: Presentations should be made periodically at judicial workshops and conferences (particularly the chief judges' conferences) to address issues related to disability retirement.
- ! RECOMMENDATION NO. 7: If the Judicial Council adopts any rules to implement the recommendations made in this report, the Circuit Executive should prepare informational materials regarding those rules, to be distributed to all judges and the AO. These materials also should be made available on the intranet.

b. Medical Certificate: Certificate of Disability

As discussed earlier, if a bankruptcy judge or magistrate judge wishes to retire as disabled, the judge must certify in writing to the chief circuit judge (in the case of a bankruptcy judge) or the relevant chief district judge (in the case of a magistrate judge) that he or she is permanently disabled. The chief judge thereafter must make a recommendation to the Director of the AO regarding the judge's claim of disability.

The task force believes that it is important that the chief judge's recommendation be based on adequate supporting medical information. Indeed, the applicable regulations currently provide that the judge must submit supporting medical documentation. *See*DIRECTOR'S REGULATIONS at § 7.01. Therefore, the task force recommends that the disabled judge be required to submit a medical certificate to the relevant chief judge.

Additionally, the task force recommends that the judge be required to waive the physician-patient privilege to allow the chief judge to contact the judge's physician, if necessary.

! RECOMMENDATION NO. 8: A bankruptcy judge or magistrate judge who wishes to retire as disabled should be required to submit to the chief circuit judge (in the case of a bankruptcy judge) or the chief district judge (in the case of a magistrate judge) a medical certificate in the form of Appendix H.

- ! RECOMMENDATION NO. 9: A bankruptcy judge or magistrate judge who seeks to retire as disabled should be required to waive the physician-patient privilege to allow the appropriate chief judge to contact the judge's physician, if necessary.
 - c. Medical Certificate: Designation of Disabled Article III
 Judge For Judicial Duties

An Article III judge who voluntarily retires as disabled assumes the status of a senior judge, which allows the judge to perform such judicial duties as he or she is willing and able to undertake, when designated to do so by the chief circuit judge, the Judicial Council, or the Chief Justice. See 28 U.S.C. § 294(b). The task force believes that disabled Article III judges who are willing and able to continue performing some judicial functions should be encouraged to do so. However, there must be some safeguards to ensure that a disabled Article III judge is medically able, and remains medically able, to perform those duties. Specifically, medical information must be made available to the chief circuit judge, Judicial Council, or Chief Justice, at the time of the initial designation and annually thereafter, to demonstrate that the disabled judge is medically able to perform the designated judicial duties. In addition, the chief circuit judge, Judicial Council, or Chief Justice must be able to contact the judge's physician, if necessary. The task force has received a legal opinion from the AO confirming that the chief circuit judge, Judicial Council, or Chief Justice may require such medical information before designating a disabled Article III judge pursuant to 28 U.S.C. §

294(b). See Appendix K (Letter dated January 6, 2000).

- PRECOMMENDATION NO. 10: An Article III judge who has voluntarily retired as disabled and who wishes to be designated for duty as a senior judge pursuant to 28 U.S.C. § 294(b) should be required to submit, at the time of the initial designation and annually thereafter, a medical certificate demonstrating that the judge is medically able to perform the judicial duties to be undertaken. *See* Appendix I.
- ! RECOMMENDATION NO. 11: An Article III judge who has voluntarily retired as disabled and who wishes to be designated for duty as a senior judge should be required to waive the physician-patient privilege, at the time of the initial designation and annually thereafter, to allow the chief circuit judge, Judicial Council, or Chief Justice to contact judge's physician, if necessary.
- ! RECOMMENDATION NO. 12: The Judicial Council should revise the applicable forms for designating a senior circuit judge or senior district judge for service to reflect the requirement that, at the time of initial designation and annually thereafter, a judge who has retired as disabled must submit a medical certificate in the form of Appendix I and must waive the physician-patient privilege.

d. Recall of Disabled Bankruptcy Judges and Magistrate Judges

Although a disabled Article III judge, if "willing and able," may continue to perform judicial duties at a reduced level as a senior judge, the same is not true for disabled bankruptcy judges and magistrate judges. With two exceptions, all bankruptcy judges and magistrate judges must perform the duties of their offices on a full-time basis. Thus, even if a disabled bankruptcy judge or magistrate judge is willing and able to perform judicial duties at a reduced level, the judge is not permitted to do so under the current statutory provisions.

As a way of tempering this somewhat harsh result, the task force looked to the current system of recalling retired bankruptcy judges and magistrate judges. There are two categories of recall of bankruptcy judges and magistrate judges: "ad hoc" recall, under which the Judicial Council may recall a retired bankruptcy judge or magistrate judge for a fixed period not to exceed a year and one day, and "extended service" recall, under which the Judicial Council may recall a retired bankruptcy judge or magistrate judge for a fixed period of more than one year but not more than three years.

The task force learned from the AO that the caseload of a recalled judge is often less than the caseload of an active bankruptcy judge or magistrate judge. Accordingly, a recall position may, in some circumstances, satisfy the medical limitations of a disabled

¹⁴The two exceptions are for recalled bankruptcy judges and magistrate judges and for magistrate judges who are expressly appointed as part-time judges pursuant to 28 U.S.C. § 631(e).

judge.

The task force found nothing in the applicable statutes or regulations that would prevent a bankruptcy judge or magistrate judge who has voluntarily retired as disabled from being eligible for recall, assuming that the judge meets any general eligibility requirements for recall and is medically able to perform efficiently and effectively the relevant judicial duties. See Appendix K (Letter dated March 6, 2000).

¹⁵ As the opinion from the AO notes, a bankruptcy judge or magistrate judge who retires as disabled must still meet the general eligibility requirements for recall. To be eligible for *extended service* recall, a retired bankruptcy judge or magistrate judge must be at least 65 years old and must have served at least 14 years. *See* Regulations of the Judicial Conference of the United States Governing the Extended Service Recall of Retired Bankruptcy Judges, *Guide to Judiciary Policies and Procedures*, Vol. III, Sec. B, Ch. VII, Exhibit B; Regulations of the Judicial Conference of the United States Governing the Extended Service Recall of Retired United States Magistrate Judges, *Guide to Judiciary Policies and Procedures*, Vol. III, Sec. B, Ch. VIII, Exhibit B. A bankruptcy judge or magistrate judge who retires before age 65 is, however, eligible for *ad hoc* recall.

- ! RECOMMENDATION NO. 13: Bankruptcy judges and magistrate judges who have voluntarily retired as disabled should be advised by the Circuit Executive about the possibility of being recalled for service. Retired judges who are willing and able to be recalled should be encouraged to contact the chief judge of the circuit.
 - e. Medical Certificate: Recall of Disabled Bankruptcy Judges and Magistrate Judges

Although the task force believes that disabled bankruptcy judges and magistrate judges who wish to continue to perform judicial duties at a reduced level should be encouraged to remain available for recall, there must be some safeguards to ensure that a disabled bankruptcy judge or magistrate judge is medically able, and remains medically able, to perform the duties of a recall position. Specifically, medical information must be made available to the Judicial Council at the time of recall, and annually thereafter in the case of extended recall, to demonstrate that the disabled judge is medically able to perform the duties of the recall position. Additionally, the Judicial Council must be able to contact the judge's physician, if necessary. The task force has received a legal opinion from the AO confirming that the Judicial Council may require such medical information before recalling a disabled bankruptcy judge or magistrate judge. *See* Appendix K.

! RECOMMENDATION NO. 14: A bankruptcy judge or magistrate judge who has retired as disabled and who wishes to be recalled for service should be required to submit a medical certificate at the time of recall, and

annually thereafter in the case of extended recall, demonstrating that the judge is medically able to perform the duties of the recall position. *See* Appendix J.

- ! RECOMMENDATION NO. 15: A bankruptcy judge or magistrate judge who has retired as disabled and who wishes to be recalled for service should be required to waive the physician-patient privilege at the time of recall, and annually thereafter in the case of extended recall, to allow the Judicial Council to contact the judge's physician, if necessary.
- PRECOMMENDATION NO. 16: The Judicial Council should revise the applicable forms for recalling a retired bankruptcy judge or magistrate judge to reflect the requirement that a judge who has retired as disabled must submit a medical certificate in the form of Appendix J and must waive the physician-patient privilege at the time of recall, and annually thereafter in the case of extended recall.
 - f. Medical Certificate: Certification of a Senior Judge as Temporarily or Permanently Disabled (28 U.S.C. § 371(f)(1)(E)).

Under 28 U.S.C. § 371(f), an Article III judge who retires in senior status generally must satisfy certain workload requirements in order to be entitled to receive salary increases of the office. There is an exception to the workload requirements for senior judges who, in the preceding calendar year, were either temporarily or permanently disabled. Under this exception, the chief judge of the circuit certifies that a senior judge

is entitled to any salary increases if the senior judge has certified in writing to the chief judge of the circuit that he or she was unable to meet the workload requirements during the preceding year because of a temporary or permanent disability. *See* 28 U.S.C. § 371(f)(1)(E).

The task force believes that it is important that the chief judge of the circuit make an informed decision when certifying that a senior judge is entitled to salary increases under section 371(f)(1)(E) by reason of a temporary or permanent disability. Thus, the task force recommends that a judge should be required to submit supporting medical information to the chief judge of the circuit when certifying, pursuant to 28 U.S.C. § 371(f)(1)(E), that he or she is temporarily or permanently disabled. In addition, the task force believes that the judge should be required to waive the physician-patient privilege to allow the chief judge of the circuit to contact the judge's physician, if necessary.

- PRECOMMENDATION NO. 17: A senior judge who certifies himself or herself as temporarily or permanently disabled under 28 U.S.C. § 371(f)(1)(E) should be required to submit to the chief judge of the circuit a medical certificate in the form of Appendix H. The judge should also be required to waive the physician-patient privilege to allow the chief judge of the circuit to contact the judge's physician, if necessary.
 - g. Medical Certificate: Continued Designation of a Senior Judge Who Has Certified As Temporarily or Permanently Disabled.

The task force found no statute or regulation that would prevent a senior judge

who has certified himself or herself as temporarily or permanently disabled under 28 U.S.C. § 371(f)(1)(E) from continuing to perform judicial duties as a senior judge. Indeed, the task force learned that it is a common practice for senior judges in the Ninth Circuit to continue to perform judicial duties after having certified themselves as temporarily or permanently disabled under section 371(f)(1)(E). The task force supports this practice. However, there should be some mechanism for ensuring that a senior judge who has certified himself or herself as temporarily or permanently disabled is medically able, and remains medically able, to continue to perform judicial duties.

PRECOMMENDATION NO. 18: A senior judge who has certified himself or herself as temporarily or permanently disabled under 28 U.S.C.

§ 371(f)(1)(E) and who wishes to continue to perform judicial duties as a senior judge should be required to submit to the chief judge of the circuit or the Judicial Council a medical certificate in the form of Appendix I demonstrating that the judge is medically able to perform the duties to be performed. The judge should also be required to waive the physician-patient privilege to allow the chief judge of the circuit or the Judicial Council to contact the judge's physician, if necessary. The medical certificate and waiver should be required before the judge continues to perform judicial duties and annually thereafter, to the extent the judge continues to certify as temporarily or permanently disabled and wishes to

continue to perform judicial duties.

B. Involuntary Disability Certification and Removal

1. Current Procedures

This section of the report outlines the current statutory procedures for addressing a situation in which a disabled judge does not voluntarily retire or certify himself or herself as disabled, thereby requiring the Judicial Council to take action. The Judicial Council generally will take action either in response to a formal complaint of judicial misconduct and disability, filed by someone outside the court, or in response to a referral from a judge (often a chief judge) to the Council.

The Act, 28 U.S.C. § 372(c), is the only statutory mechanism by which someone outside the court may formally raise the issue of a judge's apparent disability. Subsection 372(c)(1) provides, in part:

Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is *unable to discharge all the duties of office by reason of mental or physical disability*, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. (Emphasis added.)

After a complaint is filed, it is referred to the chief judge of the circuit, who decides whether it should be dismissed, concluded, or referred to a special committee for

investigation.¹⁶ The chief judge will dismiss or conclude the complaint in the following situations: (1) if the complaint does not raise an issue that is appropriate for consideration under section 372(c); (2) if the matter has been corrected; or (3) if intervening events have made action on the complaint no longer necessary. *See* 28 U.S.C. § 372(c)(3); Misconduct Rule 4.

If the complaint is not dismissed or concluded, the chief judge must appoint a special committee to investigate the complaint. *See* 28 U.S.C. § 372(c)(4). The committee must be composed of the chief judge plus an equal number of circuit judges and district judges. *See id.* The committee will conduct an investigation as extensively as it considers necessary and files a written report with the Judicial Council. *See* 28 U.S.C. § 372(c)(5). All actions of the committee should be by a majority vote of all members. *See* Misconduct Rule 10(f).

Upon receiving the committee's report, the Council has several options. If the complaint alleges or implicates the disability of a judge, the Council may, among other things, request that the judge retire; order that, temporarily, no further cases be assigned to the judge; or take other action that "it considers appropriate." 28 U.S.C. § 372(c)(6)(B). The Council may also refer the matter to the Judicial Conference of the United States, a

¹⁶The chief judge of the circuit also is authorized to initiate the complaint process personally. *See* 28 U.S.C. § 372(c)(1); Misconduct Rule 2(j). Thus, the chief judge can trigger section 372(c) even in the absence of a formal written complaint. *See id*.

course of action that is rarely pursued.¹⁷

With respect to an Article III judge, the Judicial Council may also certify the judge as disabled pursuant to 28 U.S.C. § 372(b). That statute provides, in part:

Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit . . . is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate.

28 U.S.C. § 372(b). Thus, if a judge is disabled, but refuses to certify himself or herself as disabled, section 372(b) authorizes the Judicial Council to certify the judge as disabled, in which case the President may appoint an additional judge to that court. The Judicial Council, however, cannot require a disabled judge to take senior status or to retire, which normally occurs before a new judge can be appointed to a court, because an Article III judge can be removed from office only by impeachment. Rather, if a judge is certified as disabled by the Judicial Council, something that rarely occurs, the disabled judge merely becomes junior in seniority to all other judges on that court. *See id.* In addition, the judge

¹⁷If the Judicial Council determines that the judge may have engaged in conduct that constitutes grounds for impeachment, the Council certifies such a determination to the Judicial Conference of the United States. If the Conference agrees with the determination of the Council, the Conference certifies the matter to the House of Representatives. *See* 28 U.S.C. § 372(c)(8)(A).

still receives the full salary of the office, regardless of the judge's length of service. *See* 44 Comp. Gen. 544 (1965).

By contrast, the Judicial Council may remove a disabled bankruptcy judge by majority vote of the Council's judges. *See* 28 U.S.C. §§ 152(e), 372(c)(B)(vii). Similarly, the Judicial Council may remove a disabled magistrate judge by a majority vote of the Council's judges if a majority of the district judges within the magistrate judge's district agree. *See* 28 U.S.C. §§ 372(c)(B)(vii), 631(i). Before a bankruptcy judge or magistrate judge may be removed from office, the judge must be given a full specification of the charges on which removal will be based and must be given an opportunity by the Judicial Council (and the relevant district judges, in the case of a magistrate judge) to be heard on the charges. *See* 28 U.S.C. §§ 152(e), 631(i).

A bankruptcy judge or magistrate judge who is removed from office because of a disability will receive the same salary (in the form of an annuity) and benefits that the judge would have received had he or she voluntarily retired as disabled. *See* 28 U.S.C. § 377(d), (e). For a more complete discussion of such salary and benefits, see Section

¹⁸There may be a situation in which a disabled magistrate judge does not voluntarily retire, but no judicial misconduct and disability complaint has been filed, which normally would prompt the Judicial Council to take action, including voting to remove the magistrate judge from office. However, the judges of the affected district, on their own, may remove the disabled magistrate judge from office by majority vote. *See* 28 U.S.C. § 631(i). If there is a tie vote in the district on the question of removal, the magistrate judge can be removed only upon the concurrence of a majority of the judges of the Judicial Council.

III.A.1.b, above.

- 2. Findings, Conclusions, and Recommendations for Change
 - a. Statutes on Involuntary Disability Certification and Removal

The task force concluded that neither statutory changes nor new rules regarding the procedures for certifying an Article III judge as disabled, or for removing a bankruptcy judge or magistrate judge from office, are warranted. The relevant statutes and rules currently give the Judicial Council adequate authority to address a situation in which a disabled judge refuses to resign or to retire voluntarily as disabled.

b. Complaints of Judicial Misconduct and Disability

The task force spent considerable time discussing whether to recommend changes to the current system of handling complaints of disability and misconduct and, in particular, whether disability complaints should be handled separately from misconduct complaints. The task force questioned whether the current system of responding to both types of complaints using the same procedures adequately ensures that issues of judicial disability are handled in a compassionate and cooperative manner, with the ultimate goal of *helping* the affected judge, while protecting the quality of the judicial process.

Throughout its study, the task force heard uniformly from the various disability experts of the importance of ensuring that the procedures for responding to judicial disabilities are

designed primarily to help judges, not to discipline them.

The task force considered two alternative revisions to the procedures for handling complaints of misconduct and disability. First, the task force considered whether to amend the complaint procedures so that reports of judicial disability would be *filed and processed* separately from misconduct complaints. Second, the task force considered whether to amend the complaint procedures so that reports of judicial disability are filed in the same manner as misconduct complaints, but *processed* separately. As explained below, the task force ultimately concluded that no revisions are necessary at this time. The current procedures are flexible enough to allow the chief judge of the circuit (or his or her designee) to resolve a disability-related issue non-punitively.

First, the task force considered whether reports of judicial disability should be filed and processed separately from misconduct complaints. It was suggested to the task force that completely separating the two types of complaints would ensure that matters of judicial disability are not considered disciplinary matters and are handled in a compassionate, non-punitive manner. Although members of the task force unanimously agree that judicial disabilities must be addressed in a compassionate, non-disciplinary manner whenever possible, the task force concluded that it is unnecessary to create a separate system for disability-related matters in order to accomplish this goal. Moreover, there may be situations in which a complaint implicates both judicial disability *and* judicial misconduct. For example, a judge's misconduct may be so egregious that some

form of discipline is necessary even though the misconduct resulted from a disability. Additionally, if there were separate systems for disability reports and misconduct complaints, the complainant would have to determine which system is implicated by the judge's conduct. That distinction may not be readily apparent to the complainant, because a disability can manifest itself as misconduct. For example, a lawyer may file a misconduct complaint alleging that a judge has been belligerent or absent-minded in court, not recognizing that these may be symptoms of a disability, such as dementia. Because many disabilities may cause behavior that also might warrant discipline, it may be difficult to determine at the outset whether the unacceptable conduct was caused by a disability. For these reasons, the task force concluded that a separate system should not be created to handle reports of judicial disability.

Second, the task force considered whether to create separate procedures for *processing* reports of disability, while maintaining one system for filing complaints of misconduct and disability. Again, the task force concluded that separate procedures are not necessary. Moreover, by keeping disability-related matters within the same system as misconduct complaints, the chief judge of the circuit has a certain amount of leverage to ensure that disability-related matters are resolved.

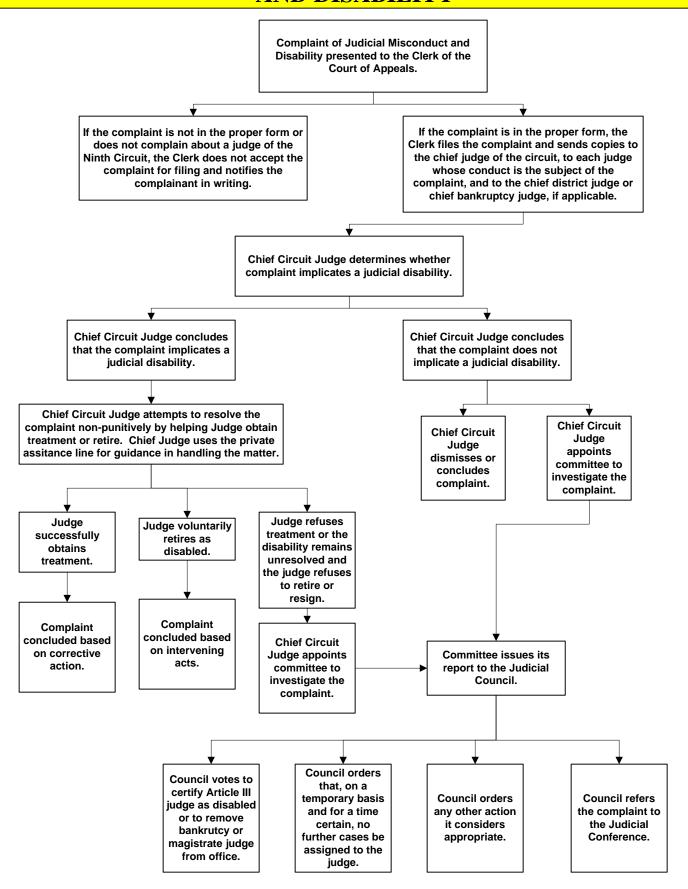
Currently, once a complaint of judicial misconduct and disability is filed, it is referred to the chief judge of the circuit, who conducts a "limited inquiry" to determine whether the complaint should be dismissed, concluded, or referred to a special committee

for investigation. *See* 28 U.S.C. § 372(c); Misconduct Rule 4(a). If, after this limited inquiry, the chief judge of the circuit concludes that the complaint alleges or implicates a potential judicial disability, the current procedures are flexible enough to allow the chief judge of the circuit to attempt to resolve the complaint outside the disciplinary process in most cases, usually by helping the disabled judge obtain treatment or retire. (In the next section of the report, the task force makes recommendations designed to assist the chief judge of the circuit in resolving these matters.)

Assuming that the complaint is resolved successfully, the chief judge of the circuit can conclude the complaint under 28 U.S.C. § 372(c)(3). For example, if the judge obtains treatment for a disability, the chief judge can dismiss the complaint on the ground that appropriate corrective action has been taken to remedy the conduct. *See* 28 U.S.C. § 372(c)(3); Misconduct Rule 4(d). If the judge decides to retire as disabled, the chief judge of the circuit can conclude the complaint based on intervening events. *Se id.* If, however, the chief judge's efforts to resolve the complaint non-punitively are unsuccessful, or if the chief judge of the circuit determines, in his or her discretion, that the complaint should otherwise be treated as a disciplinary matter, the chief judge of the circuit can continue processing the complaint under the misconduct procedures, e.g., by appointing a special committee to investigate the complaint. In the chart that follows, the task force summarizes the foregoing procedures for filing and processing complaints of judicial misconduct and disability. *See also* Appendices C-E (charting the statutory procedures

discussed in Section III.A., above, for responding to the disability of an Article III judge, bankruptcy judge, or magistrate judge).

FILING AND PROCESSING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY



IV. INFORMAL METHODS OF RESPONDING TO PERCEIVED JUDICIAL DISABILITY

A. Current Procedures

Federal Occupational Health (FOH), a non-profit division of the United States

Public Health Service, operates an Employee Assistance Program (EAP), which is

available to employees of the federal judiciary, including Article III judges, bankruptcy

judges, and magistrate judges. This EAP is typical of other employee assistance

programs; its key components are counseling and training.

Counseling services are provided by an outside contractor. In the case of the western states, including the states within the Ninth Circuit, counseling services are provided by VMC Behavioral HealthCare Services, which is based in Gurnee, Illinois. Employees may make an appointment to meet with a counselor through self-referral, supervisor-initiated referral, or other sources. Employees are entitled to six counseling visits, including assessment, short-term problem-solving, and follow-up services. If appropriate, the employee also may be referred for outside counseling or treatment. The employee or the employee's health insurer is usually responsible for the cost of an outside referral.

The EAP emphasizes training and educating supervisors, managers, and other employees regarding their roles and responsibilities for the successful implementation and use of the EAP, including techniques and procedures for referring employees to the counseling service. Other training programs include ongoing health and wellness training, with an emphasis on job performance issues and problems.

Each state bar association of the nine states in the Ninth Circuit also has some type of lawyer assistance program.¹⁹ In some states, federal judges can participate in these programs. However, the task force does not believe that these state programs are well-suited for the judges of the Ninth Circuit, for two main reasons. First, they are equipped mainly to handle drug and alcohol problems, stress, and "burn-out," and do not address many additional issues that a judge may face, including such diverse issues as diabetes and dementia. Second, concerns about confidentiality may dissuade judges from taking advantage even of appropriate state-bar programs.

After studying the current programs available to the judges of the Ninth Circuit, the task force concluded that, for three reasons, these programs do not adequately address the issues relating to judicial disability. First, these programs were not were not developed specifically for judges and, as a result, are not designed to handle the diverse disabilities, such as the consequences of strokes or Alzheimer's disease, that the federal judiciary may face because it is composed of older members. Second, because the current programs were developed for a broader range of participants than judges, they do not take into account the unique position of federal judges (e.g., that federal judges, particularly Article III judges, cannot readily be removed from office) and the unique character traits of judges (e.g., that federal judges are accustomed to being in control). Third, the task force heard

¹⁹For a detailed discussion of the programs offered by the state bar associations, please refer to Appendix F. The Commonwealth of the Northern Mariana Islands does not have a similar program, and it does not appear that Guam has such a program.

repeatedly, and task force members believe based on their own experiences, that a program for federal judges will work only if confidentiality is ensured. Although confidentiality is important in any EAP program, a program that the judiciary sets up for itself is more likely to ensure, and be perceived as ensuring, the confidentiality needs of judges than is a broader program or, at least, is more likely to garner judges' confidence in the program's confidentiality.

- B. Other Programs of Significance Studied By the Task Force
 - 1. Judicial Model: Canada and California

The task force studied two programs designed specifically to assist judges with disability-related issues. Canada and California have instituted assistance programs for their judiciaries. The task force was impressed with many aspects of these programs and has based many of its recommendations, including the recommendation to create a private assistance line, on these programs.

a. Canada

One of the few programs designed to assist judges with disability issues is the program that the Canadian federal judiciary has established. The National Judicial Counselling Programme (NJCP), founded in 1994, is a resource for Canada's 1850 federally-appointed and provincially-appointed judges and their families. The object of the NJCP is to provide a confidential program of prevention, counseling, assistance, and treatment to address personal and family problems, as well as alcohol and substance

abuse, depression, and other emotional and psychological problems that may surface.

There are two primary objectives to the NJCP: prevention and treatment.

The key to prevention under the Canadian program is education. To educate the judiciary, the NJCP has attempted to coordinate with the National Judicial Institute, the organization that offers educational programs to federally-appointed and provincially-appointed judges. Other avenues of education include articles in judicial and legal periodicals, regular mailings, and presentations at judicial conferences. As a result of additional funding recently received from the Canadian government, the NJCP is embarking on a coordinated education and publicity campaign.

In order to provide treatment, the NJCP has contracted with an outside consultant to provide assessment, counseling, and referral services, including short-term counseling for substance abuse, interpersonal problems, stress, emotional problems, and family problems. Although the consultant provides only short-term counseling, experience has shown that 90 percent of all presenting problems can be resolved in 4 to 5 hours of counseling. In 1998-1999, for example, the average number of hours of counseling per participant was 4.5 hours. However, if long-term counseling is required, the consultant will refer the judge or family member to an appropriate agency or organization. Long-term treatment is not covered by the NJCP, but many of these services are covered under provincial medicare or private health care plans.

The NJCP has established a toll-free confidential judicial assistance hotline, which is staffed by experienced intake personnel who assess the presenting problem and refer the

caller to a counselor. The program guarantees that a counselor will contact the caller within 24 hours, or sooner, in the case of an emergency.

Administratively, the Canadian program is operated by a non-profit corporation with 6 directors and a 24-member advisory board. The advisory board is comprised of 12 federally-appointed judges and 12 provincially-appointed judges. There are at least 2 board members from each province, who act as liaisons with the various courts in each province. The NJCP is independent and separate from the Canadian Judicial Council, which is responsible for judicial misconduct and discipline of federally-appointed judges, and from the provincial judicial councils, which have disciplinary responsibility over provincially-appointed judges.

The NJCP is funded through the Office of the Commissioner for Federal Judicial Affairs. It has a \$50,000 (approximately \$34,140 US) annual budget for counseling services.

An estimated 50 percent of those who use the hotline are judges. The other 50 percent are family members. More women than men tend to use the hotline. Utilization of the hotline was at 2.5 percent when the program began and peaked at 4.5 percent following a period of heavy promotion. Utilization is currently at 3.3 percent but, according to a judge who is actively involved in running the program, should average around 5 to 6 percent with adequate promotion. Promotion of the program has suffered because, until recently, there was no operating budget. Instead, the program relied on promotion by speakers at judicial conferences and bar association meetings and by articles

in periodicals. Additionally, some promotional materials have been mailed to judges' homes. Now that additional funding has been provided by the Canadian government, the NJCP has started actively promoting the program among the judges.

b. California

California is one of the few states in the Ninth Circuit that has established an assistance program specifically for its judiciary. California's program offers confidential counseling to state judges through the California Judges Association. The program includes a 24-hour toll-free hotline to assist judges who may be in need of counseling or other intervention.

The program was established in the early 1990s. Over the years, the assistance line has been used primarily by the presiding judges, who call for advice concerning their colleagues. Most of the calls relate to emotional problems, rather than to substance abuse.

2. Medical Model: Physician Well-Being Committees

The task force heard several presentations regarding "physician well-being committees." A physician well-being committee is a committee, comprised primarily of physicians, that is charged with coordinating the confidential assessment and referral of physicians who suffer from chemical dependency, physical illness, or mental illness that may impair their ability to practice medicine safely and effectively. Such committees also are charged with promoting patient safety.

The committee receives self-referrals from physicians and also accepts inquiries from concerned medical staff, family members of potentially impaired physicians, and

community members. If, after assessment, the committee determines that treatment is necessary, a referral is made. Although the committee cannot mandate treatment, and it is powerless to impose discipline, the hospital may restrict the physician's privileges if he or she does not participate.

Following treatment, the committee assists in coordinating the physician's return to work. Managers are directed to outline clear, objective behavioral expectations. In addition, a work-site monitor will be assigned to report back to the committee.

Many well-being committees also sponsor preventive programs. Programs include educational workshops on managing work-related stress and on developing the tools to improve the quality of one's life.

After studying the physician well-being committees, the task force concluded that this model for a professional assistance program is not well suited to federal judges. Well-being committees are closely tied to the disciplinary process, whereas the task force heard unanimously from disability experts and other individuals closely involved with disability-related issues that an effective assistance program for judges must be oriented toward helping judges, not disciplining them. Moreover, because the well-being committees are tied to discipline, physicians are likely to feel compelled to participate in the assistance programs. Such a program would not be appropriate for the judges of the Ninth Circuit. The threat of termination does not exist here as it does in hospitals, at least with respect to Article III judges. Only Congress can remove an Article III judge. In addition, judges are

accustomed to being in control. As a result, they are likely to resist a program that compels participation through threats of disciplinary action. Finally, the geographic dispersal of peers within the circuit makes the physician model impractical for judges in the Ninth Circuit.

C. Findings, Conclusions, and Recommendations for Change

The task force concluded that there is a clear need for a new informal program to address issues of judicial disability within the Ninth Circuit. As discussed earlier, the current programs that are available to judges in the circuit (including the EAP and the programs offered by most states) were not designed to handle the diverse disabilities that the federal judiciary may face and do not take into account the unique position and character traits of federal judges. In addition, judges may not perceive the EAP and state programs as sufficiently confidential. As a consequence, judges of the Ninth Circuit are less likely to use these programs than a program that is created by the judiciary for itself.

The task force spent considerable time debating what kind of program would be the most effective to address disability-related issues pertaining to the judges of the Ninth Circuit. In developing a new program, the task force relied on four basic principles, which were uniformly emphasized to the task force, throughout its study, by disability experts and other persons involved with disability-related issues, including judges who have become disabled. First, the primary purpose of the program must be to *help* judges. Second, the program must be designed to provide non-confrontational, supportive, and

caring assistance to judges in need. Third, the program must foster trust and respect among judges. Fourth, the program must be designed to ensure, and be perceived as ensuring, the confidentiality of communications.

Using these principles, the task force recommends adoption of the following assistance program for the judges of the Ninth Circuit. There are two components to this program: (1) a 24-hour private assistance line to provide preliminary assessment, intervention, and referral services regarding judicial disabilities; and (2) a preventive program designed to educate the judiciary about issues of health and wellness.

1. Private Assistance Line: Overview

The centerpiece of the assistance program is a 24-hour private assistance line that will be available to judges, their staffs, 20 and their families for assistance regarding judicial disabilities. The assistance line will be staffed by one or more counselors, which the task force refers to as "gatekeepers," who are trained to provide preliminary assessment, intervention, and referral services regarding judicial disabilities. Judges, their staffs, and their families often are not able to handle these difficult situations on their own and are not comfortable asking for help from someone within the court. Indeed, the task force heard from several chief district judges that they would like help from a professional outside the court, should a disability-related situation arise in their district. In addition, as the task

²⁰For purposes of this report and its recommendations, a judge's staff consists of law clerks and secretaries.

force learned, the Canadian and California programs, which have developed similar assistance lines, have had very positive experiences with this service.

The private assistance line will serve three important functions. First, it will be a resource for judges who need assistance regarding their own disabilities. Second, it will be a resource for judges who need guidance regarding the disability of another judge or a family member,²¹ and for members of a disabled judge's staff and family needing guidance regarding the disabled judge. Third, it will be a resource for chief judges to consult when attempting to address a situation involving a disabled colleague.

a. Judges Needing Personal Assistance

There may be situations in which a judge will contact the private assistance line for help regarding his or her own disability. For example, a judge may know that he or she is suffering from a disability, but may not know how to get help. In that situation, the gatekeeper will be able to refer the judge to an appropriate counselor or health care provider. The cost of any referral program would be covered by the judge of the judge's insurance provider.

b. Assistance Regarding Another Judge

There also may be situations in which a judge or a member of a judge's staff or

²¹The private assistance line may be helpful for a judge who is dealing with the disability of a family member. This disability of a family member often is as stressful as one's own disability, and may impair the ability of a judge to perform judicial duties effectively.

family contacts the private assistance line regarding a judge.²² For example, a judge may have noticed that a colleague has been absent-minded, but may not know whether the judge is suffering from a disability, such as dementia. The gatekeeper will be available to talk with the concerned judge, provide an initial assessment, and give the judge advice on how to proceed with the situation. Or, a family member may be aware that a judge has a drinking problem, but may not want to discuss the judge's problem with the judge's colleagues. The counselor will be able to refer the family member to a counselor who will help guide an intervention or suggest ways to get appropriate treatment for the judge.

c. Assistance for Chief Judges

The private assistance line also will provide important assistance to the chief judge of the circuit and the chief district judges, who may be faced with disability-related situations on their courts. This will be a critical function of the private assistance line, because chief judges, as the administrative heads of the courts, are ultimately responsible for ensuring that matters affecting the administration of the courts, including issues of judicial disability, are handled properly.²³ Moreover, a chief judge is most likely to be

²²Members of a judge's family or staff would be permitted to contact the private assistance line only about *that* judge. A judge would be permitted to make a contact about a colleague, however.

²³The chief judge of the circuit should be responsible for disability-related matters affecting the circuit judges, chief district judges, and chief bankruptcy judges. Chief district judges should be responsible for disability-related matters affecting the district judges and magistrate judges in their districts. And, chief bankruptcy judges should be responsible for disability-related matters affecting the bankruptcy judges on their courts. Although the bankruptcy courts are units of the district courts, the task force concluded that the chief bankruptcy judge should take the lead regarding disability-related issues of bankruptcy judges because the chief bankruptcy judges are most likely to be aware of

aware of a problem facing a judge on his or her court.

When a chief judge is aware that a judge on his or her court is having a problem, the chief judge should contact the private assistance line for guidance. The gatekeeper will be able to provide an initial assessment of the problem and guide the chief judge in handling the situation. The chief judge does not have to diagnose the problem or devise a plan for addressing the problem. Indeed, the experts overwhelmingly agree that judges should contact a gatekeeper for guidance. That is the gatekeeper's expertise and responsibility.

Additionally, a chief judge should not feel that he or she must handle each disability-related situation personally, especially if it involves directly approaching the judge. For example, the chief judge may feel hindered by a close personal relationship with the affected judge. Or, just the opposite, the chief judge may feel hindered by the lack of a personal relationship with the affected judge. In any case, the role of the chief judge is merely to ensure that appropriate action is being taken to try to help the affected judge. The chief judge should feel free, in his or her best judgment, to delegate certain responsibilities, such as approaching the affected judge, to one or more respected members of the court or even to a family member. The task force learned that, depending on the nature of the disability, it may be appropriate for a team of two or three individuals to approach the judge. This is true, for example, in the case of a judge who is suffering from

problems facing bankruptcy judges on their courts.

Alzheimer's disease or alcoholism. However, disability experts caution that whoever has the task of contacting the affected judge should expect his or her efforts to be rejected several times.

The task force learned that one of the primary reasons why a judge is likely to resist assistance is the judge's concern about managing his or her workload. Disability experts warn that an intervention or treatment program will not work unless a program for managing the judge's case load is in place before the judge is contacted. Therefore, it is imperative that, before a judge is approached regarding treatment or other assistance, the appropriate chief judge have a plan in place for handling the judge's case load, if necessary.

In addition, the task force learned, a judge likely will be concerned that his or her condition and any treatment will not be kept confidential. The judge must be assured that all matters concerning his or her disability will be kept confidential.

2. Private Assistance Line: Hallmarks

Critical to the successful utilization of the private assistance line are the following factors: (1) proper selection of an outside gatekeeper who is capable of responding to the diverse disability-related issues facing federal judges; (2) confidentiality of the assistance line; (3) independence of the assistance line from disciplinary matters; (4) acceptance by the judges, particularly chief judges; and (5) adequate promotion of the line.

a. The Gatekeeper

As detailed elsewhere in this report, federal judges are unique professionals who face a diverse array of disability-related issues. Unlike a typical "employee assistance program," the assistance program that the task force is recommending must be capable of addressing these wide-ranging issues. Thus, it is critical that the private assistance line, which is the centerpiece of the program, be staffed by one or more counselors who are trained and experienced in providing assessment, intervention, and referral services on these diverse issues. In addition, those counselors must be educated about the work of federal judges and the unique problems that they may face.

In developing its recommendations for a private assistance line, the task force met with the director of the Center for Human Resources (CHR). CHR currently provides counseling services to the California Judges' Association that are similar to the services contemplated by the private assistance line. The task force understood from its discussions with CHR and others closely involved with disability-related issues that it would be possible to find one or more qualified counselors to staff a private assistance line for the judges of the Ninth Circuit.

b. Confidentiality

Disability-related matters are extremely sensitive and personal. For this reason, the task force recognizes that judges and members of their staffs and families may hesitate to ask for help when needed for a judge on the court. It is critical, therefore, that the private

assistance line be *confidential*. If the Judicial Council develops a private assistance line as recommended by the task force, the Council should take steps, such as adopting appropriate rules, to ensure that all communications to and from the private assistance line will be kept strictly confidential, both internally and by the gatekeeper, unless disclosure is expressly authorized by the affected judge.

c. Independence

In addition to having concerns about confidentiality, judges and members of their staffs and families may hesitate to contact the private assistance line for fear of exposing the affected judge to potential disciplinary action. It is imperative, therefore, that the assistance line be completely independent of, and distinct from, the disciplinary system. Although there may be times when a disabled judge may be subject to discipline (e.g., if the judge's conduct is so egregious that it warrants discipline), this disciplinary action must not result from any use of the private assistance line. Moreover, as stated above, the Judicial Council should take steps to ensure that no communications to or from the private assistance line may be used during a disciplinary proceeding, without the express consent of the affected judge.

d. Participation By Judges

The best designed assistance program will be ineffective unless it is actually used.

Traditionally, there has been a perception that federal judges are unwilling to use an assistance program, either for personal help or for help regarding a colleague. Whether

this unwillingness stems from a desire to protect oneself, the affected judge, or the court, it does not help to ignore a judge's disability. A judge who is suffering from a disability needs the help, respect, and support of his or her colleagues. Judges therefore need to recognize the importance of taking action when necessary to help themselves and their colleagues. *See also* Code of Conduct Canon 3(B)(3) (encouraging every judge to take "appropriate action" when the judge becomes aware of unprofessional conduct by another judge). This may mean talking to a judge who appears to need help, talking to the appropriate chief judge, or contacting the private assistance line.

e. Promotion

Adequate promotion is essential to the successful utilization of any assistance program. Assuming that the Judicial Council develops a private assistance line, this service should be promoted vigorously to judges, their families, and their staffs. Based on the types of promotion that other associations have used successfully, the task force recommends that the Judicial Council include training sessions at chief judges' meetings, judges' workshops, and at other judges' conferences and meetings. Role-playing using difficult scenarios may be an effective training technique for the chief judges. Also, the Council should send direct mailings to judges' homes.

3. Private Assistance Line: Costs

The task force recognizes that there will be some costs associated with a private assistance line. However, these costs, which are relatively minor, are substantially

outweighed by the benefits to the court, the judges, and the public in handling judicial disability matters effectively and efficiently.

In an attempt to quantify the costs associated with a private assistance line, the task force solicited from the CHR a rough estimate of the potential cost to run an assistance line for the approximately 335 federal judges in the Ninth Circuit.²⁴ CHR estimated a utilization rate of less than 10 percent during the first year and 5 percent in subsequent years. Based on those numbers, CHR estimated a total cost of \$10,300 the first year and \$6,300 annually thereafter. The first year is more expensive because there are various start-up costs, including the cost of locating a network of qualified counselors to cover the circuit geographically. CHR's cost estimate includes: 24-hour intake service through the assistance line; telephone consultation for judges, their family members, and their staffs; and referrals to counselors and health-care providers when appropriate. The cost also would include some promotion of the program to the judges, such as a presentation at a judicial conference.²⁵

Another cost associated with the private assistance line is the cost of the telephone

²⁴The estimate was obtained for informational purposes only.

²⁵Also in an attempt to estimate the costs associated with the proposed assistance line, the task force compared the costs of the Canadian and the California Judges Association programs. The Canadian program has an annual operating budget of about \$34,140 (\$50,000 Canadian) for its counseling services, which covers 1,850 judges. The cost of the California Judges Association program, which is very minimal according to CHR, is difficult to quantify because the cost is subsumed in the budget of the lawyer-assistance program that is run by the state bar through CHR. The annual cost to run both programs is \$77,000.

Assuming that a government contract can be used (as distinct from a general commercial service), the projected per-minute charge for using the toll-free line would be 4.1 cents (\$2.46 per hour) domestically and 5.4 cents (\$3.24 per hour) from Guam.²⁶ Toll-free

line itself. The task force solicited estimates regarding these expected expenses.

persons wishing to use the assistance line from this area likely would have to call collect.

service is not available for the Commonwealth of the Northern Mariana Islands. Instead,

Additional costs include a monthly fee of approximately \$30 and a one-time installation

fee of \$70.

An additional cost associated with a private assistance line relates to those times when, after consultation between a chief judge (or designee) and the gatekeeper, the gatekeeper feels that it is necessary for the chief judge to consult with an outside counselor for further guidance in addressing a situation. Although the task force believes that this will be a rare occurrence, it is an item that should be included in a budget for the program. Unappropriated court funds could be used in these situations.

Based on the foregoing general discussion of a private assistance line, the task force makes the following recommendations.

! RECOMMENDATION NO. 19: The Judicial Council should develop a 24-hour private assistance line that would be available for use by judges, their

²⁶A commercial contract would be significantly more expensive: an \$11 per hour minimum monthly charge plus long distance charges for those calling from outside parts of California.

families, and their staffs to provide preliminary assessment, intervention, and referral services regarding a potential judicial disability. The assistance line also should be available for use by judges who are dealing with the disability of a family member. The assistance line should be run by an outside consultant and should be staffed by one or more counselors who are trained to provide assessment, intervention, and referral services specifically for federal judges.

- ! RECOMMENDATION NO. 20: All communications to and from the assistance line must remain completely confidential and must not be used in any disciplinary matter without the express consent of the affected judge, even if a referral is made pursuant to disciplinary action taken under 28 U.S.C. § 372(c). The judicial council should enact rules and take any other steps necessary to ensure such confidentiality.
- ! RECOMMENDATION NO. 21: Members of a judge's staff or family should be permitted to contact the private assistance line only about the judge for whom the staff person works, or the judge to whom the family member is related.
- ! RECOMMENDATION NO. 22: All judges should be educated about the availability of the private assistance line and should be encouraged to use it as a resource, both when they have personal concerns and when they have

concerns about a colleague. Informational programs should be presented at judges' conferences and meetings in this regard. These programs should include presentations about the importance of addressing disability-related issues and the availability of resources, such as the private assistance line. Judges' staffs and families should also be encouraged to use the private assistance line as a resource when concerned about a judge who may be suffering from a disability. Direct mailings describing the assistance line should be sent to judges' chambers and homes.

- PRECOMMENDATION NO. 23: Chief judges should receive training to recognize and respond to potential disability-related issues. Chief judges should also be given an opportunity to meet the counselor(s) who will be assisting the chief judges through the private assistance lines. Chief judges' conferences are an appropriate forum for conducting such training.
- ! RECOMMENDATION NO. 24: Chief judges should take responsibility for seeing that help is given to a disabled member of the court, either by the chief judge or his or her designee. This includes contacting the private assistance line for guidance in handling disability-related situations and developing a plan for handling the disabled judge's case load, if necessary, before approaching the judge regarding treatment or other assistance.

4. Preventive Programs

The task force believes that, in addition to establishing and maintaining a private assistance line, any assistance program for the judges of the Ninth Circuit should have a preventive component to educate judges and their spouses about issues of health and wellness, including ways to prevent or lessen the symptoms of disabilities. Educational programs should focus not only on familiar topics, such as healthy eating, exercise, and ways to prevent and manage stress, but also on less familiar topics, such as the need for routine physical and mental examinations and the ways to recognize early signs of certain diseases, such as Alzheimer's. Although routine mental examinations are not well known, most internists are equipped to perform basic mental status examinations, such as the Mini-Mental Status Examination. The task force learned that the progression of some diseases, such as Alzheimer's, can be slowed when diagnosed early by a basic examination and then treated with medications. For example, without medication, a person with Alzheimer's, which is a progressive and currently incurable disease, can expect to require total care within two to eight years from onset of the disease. If the disease is diagnosed early and treated with medication, that time can be extended to five to 15 years. In addition, many new and promising medications, which could extend that time even further, are currently being tested.

The task force therefore recommends that the Judicial Council develop and present educational programs for judges and their spouses at judges' meetings and conferences

regarding the most common diseases and disabilities that the judiciary may encounter and regarding preventive steps that all judges should take to help ensure their continued good health. In particular, these programs should highlight the importance of routine physical and mental examinations and should encourage all judges to undergo such examinations.

- ! RECOMMENDATION NO. 25: The Judicial Council should develop and present educational programs for judges and their spouses at judges' meetings and conferences regarding issues of health and wellness, including preventive steps that all judges should take to help maintain good health.
- ! RECOMMENDATION NO. 26: All judges should be strongly encouraged to undergo routine physical and mental examinations.

V. DISSEMINATION OF OTHER DISABILITY-RELATED INFORMATION

The task force has already made several recommendations intended to help disseminate pertinent disability-related information. This section of the report details an additional measure that the task force believes will help further ensure that judges, their families, and their staffs have easy access to information on a wide range of disability-related issues.

! RECOMMENDATION NO. 27: The Judicial Council should publish and disseminate to judges, their families, and their staffs a resource list containing the names and telephone numbers of people to contact at the AO and within the circuit if they have questions regarding disability issues. This

list should include, for example, telephone numbers for the private assistance line, the chief judges, and someone at the AO who can answer questions about retirement benefits.

VI. FUTURE ISSUES

If the Judicial Council adopts some or all of the recommendations in this report, a lot of work will remain to take these recommendations from concept to reality. The task force therefore recommends that the Judicial Council appoint a "continuity committee," which will be responsible for implementing any recommendations adopted by the Judicial Council. The task force believes that it will take up to two years to implement the recommendations made in this report. The task force also believes that, because these issues affect all judges of the Ninth Circuit equally, the continuity committee should be comprised of, at a minimum, the chief judge of the circuit (or his or her designee), one district judge, one bankruptcy judge, and one magistrate judge. If neither the district judge nor the chief judge's designee is a senior judge, a senior judge should be appointed to the continuity committee. In addition, at least one member of the continuity committee (but not all) should be a member of the current task force.

Even assuming that the Judicial Council adopts the task force's recommendations, these recommendations represent just the first steps toward ensuring that the circuit responds appropriately to judicial disabilities. These recommendations surely will not resolve all concerns regarding judicial disabilities. In addition, there may be advances in

medicine, and relevant statutes and rules may change. Many of these changes are sure to affect the circuit's procedures for responding to judicial disabilities. For example, dramatic advances in the early diagnosis and treatment of diseases may warrant mandatory periodic mental and physical examinations. Or, funding changes within the judiciary might allow the circuit to cover more costs associated with issues of health and wellness, such as expanding the confidential assistance program to cover the cost of at least some counseling sessions for individual judges or their immediate family members, along the lines of the Canadian program. Therefore, the circuit should periodically authorize the continuity committee to assess whether it is properly responding to issues of judicial disability and whether any different or additional measures are necessary. That assessment should include a review of whether the private assistance line is being staffed by qualified medical and psychological specialists.

Additionally, the task force uncovered at least one issue that it believes should be considered at a later date. The task force learned that a disabled judge who has served for less than 10 years will receive a different salary depending on whether the judge voluntarily retires as disabled under 28 U.S.C. § 372(a) or is certified as disabled by the Judicial Council under 28 U.S.C. § 372(b). A judge who voluntarily retires as disabled will receive only 50 percent of the salary of an Article III judge, whereas a judge who is certified as disabled by the Judicial Council will receive 100 percent of that salary. A disabled Article III judge who has served less than 10 years, therefore, has an incentive not

to retire voluntarily as disabled even if the judge recognizes the need to retire. This salary issue is beyond the current scope of the task force's mission. However, it is an issue that should be considered in the future by the Council.

- ! RECOMMENDATION NO. 28: The Judicial Council should appoint a "continuity committee" to implement the recommendations, if any, adopted by the Judicial Council. This committee should be appointed for two years and should be composed of at least one district judge (preferably a senior judge), one bankruptcy judge, and one magistrate judge.
- ! RECOMMENDATION NO. 29: After the recommendations have been implemented, the Judicial Council should periodically authorize the continuity committee to reassess the issues raised by this report to determine whether any different or additional measures are necessary and whether the circuit is properly responding to issues of judicial disability.

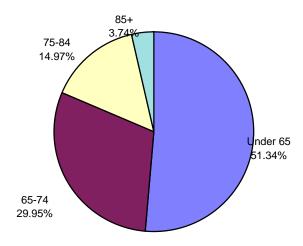
VII. CONCLUSION

The task force understands that this report raises sensitive and personal issues.

However, these issues are very important for every judge in the circuit. Every judge of the Ninth Circuit is likely at some point while in office either to become disabled or to have a close colleague become disabled. The court must confront these difficult issues now, so that it is properly prepared to help a judge in need. Indeed, all the task force's recommendations are intended to benefit the judges of this circuit by ensuring that any judge who becomes disabled receives the utmost support and respect from the court.

Appendix A

Age Breakdown of All Article III Judges in the 9th Circuit
(as of February 9, 2000)



		udges in		Onodic
Ages	Circuit	District	Total	% of Total
Under 65	17	79	96	51.34%
65-74	15	41	56	29.95%
75-84	9	19	28	14.97%
85+	1	6	7	3.74%

Appendix B

Model Certificates of Disability

When an Article III judge, bankruptcy judge, or magistrate wishes to retire as disabled, the chief circuit judge or chief district judge must send a "certificate of disability" to the president or the Director of the AO, depending on the judicial office of the retiring judge. The following letters are model certificates of disability to assist the chief judges. There are three models: one for retiring Article III judges, one for retiring bankruptcy judges, and one for retiring magistrate judges. With respect to a retiring bankruptcy judge or magistrate judge, a medical certificate and waiver of the physician-patient privilege should be presented to the relevant chief judge before the certificate of disability is completed. See Appendix H.

ARTICLE III JUDGE

Presi The V	Honorable dent of the United States White House hington, D.C. 20500	
Dear	Mr. President:	
dutie	e [specify name of district or circuit s of [his] [her] office and is retiring	I States [District] [Circuit] Judge
		Sincerely,
		Chief Circuit Judge
		Chief Chedit Judge
cc:	[Chief District Judge] Director, Administrative Office Chief, Judges Compensation and Circuit Executive	Benefits Branch

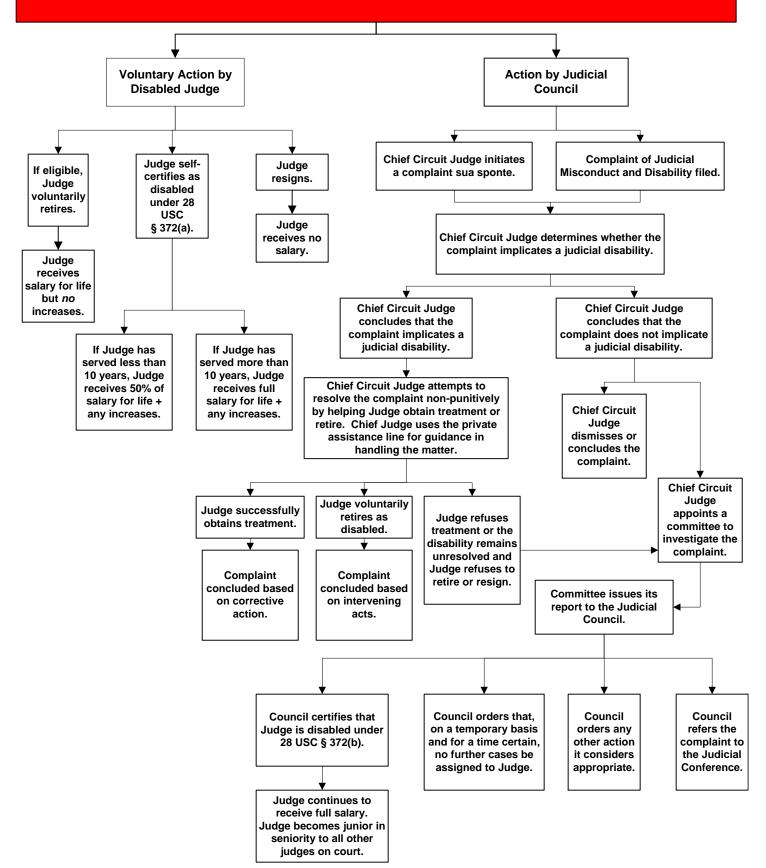
BANKRUPTCY JUDGE

<u>D:</u>	
Direc	
	inistrative Office of the ed States Courts
	hington, D.C. 20544
vv asi	mington, D.C. 20044
Dear	· Director:
regul	In accordance with the Retirement and Survivors' Annuities for Bankruptcy Judges Magistrates Act of 1988, 28 U.S.C. § 377(d), and section 7.01(c) of the Director's lations implementing the Act, I hereby recommend that you approve the request for nanent disability retirement of [Name of Bankruptcy Judge] of the District of This recommendation is based on the following information, which is
enclo	osed with this letter:
1.	The letter submitted by Judge on certifying that [he] [she suffers from [specify illness], which has rendered the judge permanently disabled from performing the duties of a United States Bankruptcy Judge.
2.	The medical certificate of Dr, which demonstrates that Judge has a serious medical condition that prevents [him] [her] from performing the duties of a United States Bankruptcy Judge.
	Please let me know if you require any further information.
	Sincerely,
	Chief Circuit Judge
	osures [(1) letter from the bankruptcy judge certifying that he or she is disabled; Medical Certificate, <i>see</i> Appendix H).
cc:	Circuit Executive

MAGISTRATE JUDGE

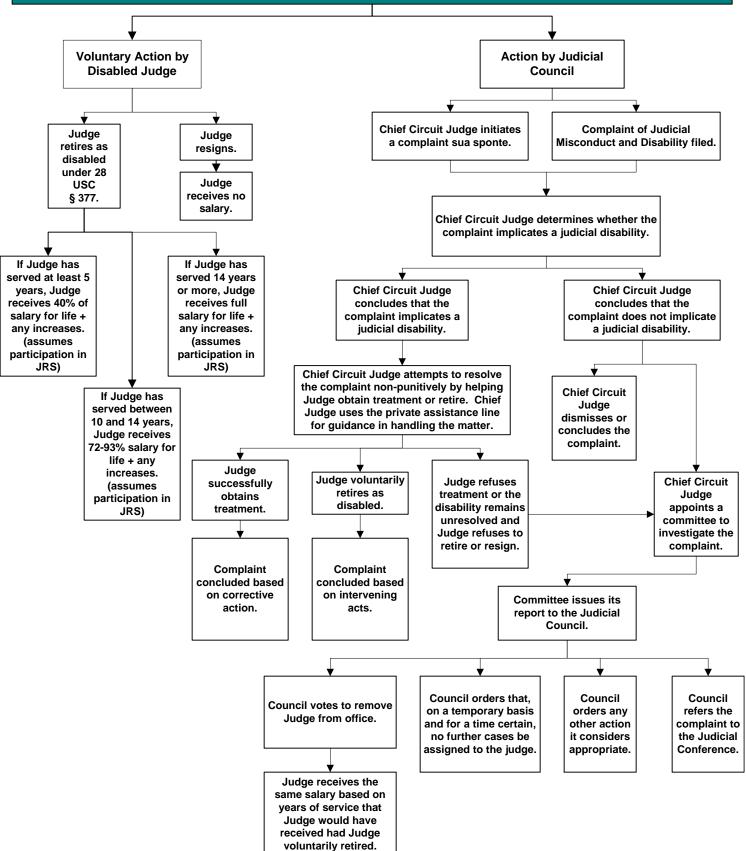
Dire	
	uinistrative Office of the ed States Courts
	hington, D.C. 20544
Dear	Director:
regui perm	In accordance with the Retirement and Survivors' Annuities for Bankruptcy Judge Magistrates Act of 1988, 28 U.S.C. § 377(d), and section 7.01(c) of the Director's lations implementing the Act, I hereby recommend that you approve the request for nanent disability retirement of [Name of Magistrate Judge] of the District of This recommendation is based on the following information, which is osed with this letter:
1.	The letter submitted by Judge on certifying that [he] [she suffers from [specify illness], which has rendered the judge permanently disabled from performing the duties of a United States Magistrate Judge.
2.	The medical certificate of Dr, which demonstrates that Judge has a serious medical condition that prevents [him] [her] from performing the duties of a United States Magistrate Judge.
	Please let me know if you require any further information.
	Sincerely,
	Chief District Judge
	Chief District Juage
	osures [(1) letter from the magistrate judge certifying that he or she is disabled; Medical Certificate, <i>see</i> Appendix H).
cc.	Circuit Executive

WHEN AN ARTICLE III JUDGE BECOMES DISABLED*

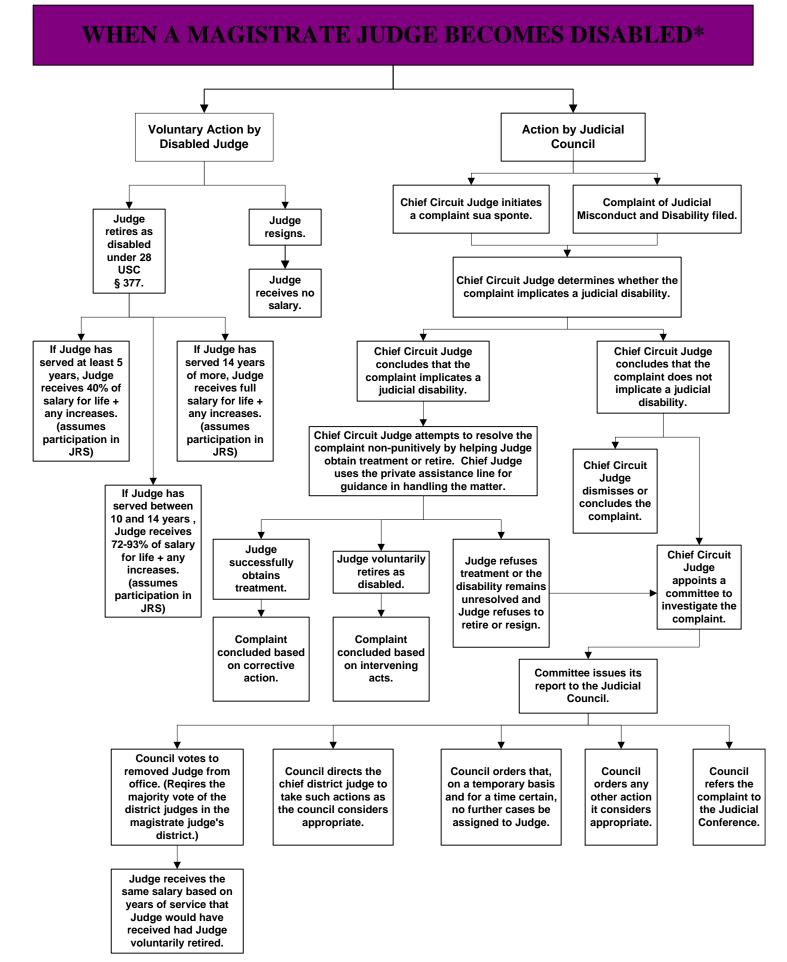


^{*}This chart outlines the two statutory procedures for addressing judicial disability, described in Section III, above.

WHEN A BANKRUPTCY JUDGE BECOMES DISABLED*



^{*}This chart outlines the two statutory procedures for addressing judicial disability, described in Section III, above.



^{*}This chart outlines the two statutory procedures for addressing judicial disability, described in Section III, above.

Appendix F

Summary of Programs in Other Jurisdictions

1. Other Circuits

The AO reported that no other circuit has developed procedures specifically to address issues associated with judicial disability.

2. The Administrative Office of the United States Courts

The AO sponsors an Employee Assistance Program (EAP) that is available to all employees of the judiciary, including judges. The EAP offers free, confidential professional counseling and referral services to federal employees who would like help with personal, job, or family problems.

3. American Bar Association

The Judicial Division of the American Bar Association has no program to address judicial disabilities, nor has the issue been addressed by any of the existing committees. There is an ABA Commission on Mental and Physical Disability, and its mission is to "explore, report, and recommend policies and programs to promote full and equal entry and participation in the legal profession for persons with disabilities."

The ABA also has a Commission on Impaired Attorneys. The goal of the commission is to establish a lawyer assistance program in every state that has the authority and resources to provide comprehensive assistance to lawyers and judges with problems related to alcoholism, addiction to other drugs, and mental health problems that result in impairment of professional function. To that end, the Commission created a model lawyer assistance program to assist state and local bar associations in the development and maintenance of effective programs to identify and help lawyers, law students, and judges who are impaired by alcoholism, other forms of chemical dependency, or mental health problems. The model program also was designed to provide monitoring and other services to those referred by the disciplinary system as an alternative to discipline or a part of a disciplinary sanction, such as probation.

4. State Programs

The following disability programs exist for lawyers or judges in the nine states within the Ninth Circuit. No comparable programs exist in Guam or the Commonwealth of the Northern Mariana Islands.

a. Alaska

The Alaska Judicial Council does not have a program for disabled judges. Council administrators refer judges who seek help to the State Bar Lawyers' Assistance Program. That program provides services to members of the bar, their families, or business associates when it appears that a bar member is suffering from substance abuse. The director of the program said that judges are entitled to avail themselves of the lawyers' program but that none ever had.

b. Arizona

The Commission on Judicial Conduct does not have a disability program. Problems with judges have been handled informally, usually by the local court, by giving the judge some time off. The State Bar of Arizona sponsors a Member Assistance Program that provides confidential services to lawyers, judges, and law students who are having difficulties at work or in their personal lives or are struggling with problems related to mental health, or to alcoholism or other forms of chemical dependency.

c. California

The California Judges Association sponsors the Judicial Support Network, a confidential 24-hour judicial support hotline operated by an independent contractor, the Center for Human Resources. Services available through the network include peer counseling, referrals to local therapists, referrals to the 12-step program "The Other Bar" or, if the judge is facing a disciplinary matter and would like advice on how to best defend himself or herself, the judge may be referred to the network's Judicial Discipline Advisory Panel. Additionally, the State Bar of California sponsors another program operated by the Center for Human Resources, the Lawyers' Personal Assistance Program, which is a free, confidential counseling and referral service.

Under a recent change in the California Code of Judicial Ethics, state judges are required to report themselves to the state Commission on Judicial Performance if they are charged with an alcohol- or drug-related misdemeanor. The amended rule, Canon 3D(3), now reads: A judge charged or convicted of "all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions or the personal use or furnishing of alcohol shall promptly and in writing report that fact to the Commission on Judicial Performance."

d. Hawaii

The Hawaii State Bar has an Attorney and Judge Assistance Program, established by Hawaii Supreme Court rule. The program is completely confidential and provides for civil immunity for program staff. In the past seven years, only three judges have used the program. One was a recovering alcoholic, and two called with concerns that their children might have substance abuse problems. Judges frequently call the program to refer lawyers who have appeared before them.

e. Idaho

The Idaho Judicial Council has no disability program for judges. The Idaho State Bar is just now implementing a Lawyers' Assistance Program, which will be available to judges as well as to lawyers.

f. Montana

The Judicial Standards Commission does not have a formal disability program. Some judges attempt to get their peers into treatment and generally get cooperation. If not, the matter ends up as a disciplinary action. The Montana State Bar sponsors the Alcohol and Drug Assistance Network, a committee of lawyers that offers confidential assistance to judges and lawyers who are struggling with issues related to alcohol or drug abuse.

g. Nevada

The Commission on Judicial Discipline has no program for disabled judges. The State Bar program is called Lawyers Concerned for Lawyers and has little or no judicial participation.

h. Oregon

The Oregon State Bar Professional Liability Fund sponsors the Attorney Assistance Program, which is open to judges. The program offers assessment, intervention, referral, and education to lawyers, judges, and legal staff who are struggling with alcohol- or drug-dependency issues. The program is completely confidential; in fact, no written records are kept by program staff, nor is there a requirement that information be shared with the state licensing board. Lawyers, judges, legal staff, and family members are referred to the program though self-referral, peer referral, and court referral (*e.g.*, a judge arrested for driving while intoxicated).

i. Washington

The Washington state courts operate an informal, confidential program to address judicial disability. When a complaint is made against a judge alleging disability-related problems, the President of the State Judges Association appoints a panel of three judges to look into the allegations. Those appointed to the panel are widely respected colleagues who have a good understanding of the nature of the apparent problem. At the state courts' annual meeting, a report is made as to the number of cases initiated, pending, and resolved, but no judges are mentioned by name, nor is the nature of any of the alleged problems discussed. The Washington State Bar also sponsors the Lawyers' Assistance Program, which offers confidential assistance with mental, emotional, drug, alcohol, family, health, and other personal problems to lawyers and judges.

5. Canada

The Canadian Judges' Conference sponsors the National Judicial Counselling Programme. It provides confidential counseling, assistance, and treatment to federally-appointed and provincially-appointed judges in Canada. The NJCP contracts with an outside consultant to provide these services. The program is funded by the Office of the Commissioner for Federal Judicial Affairs. For a more detailed description of the NJCP, see Section IV.B.1.a, above. Additionally, the Canadian Bar Association offers a health, wellness, and recovery education series for both the legal profession and judges.

Appendix G

Summary of Presentations Regarding Specific Disabling Conditions

1. Addiction

Addiction is "compulsive use." Many doctors believe that addiction is a disease that can be treated effectively with medications. Classic signs of addiction are low productivity, frequent absences from work (especially at beginning of a workweek), and arriving late and leaving early. Tell-tale behavior on the bench can include staring off into space, inappropriate flashes of anger, falling asleep, and falling off the bench.

Many people who are suffering from addiction problems have an associated mental health problem and are self-medicating. The most common underlying mental health problem is depression. The second most common mental health problem that leads to self-medication is post-traumatic stress disorder, usually associated with childhood abuse.

2. Dementia

Dementia is a cognitive or memory loss that causes significant impairment. "Senility" refers to age-related dementia. Classic signs of dementia include "cover-up" behaviors such as generalizing, withdrawing from activities, and blaming others for missing items. A person may also experience a decrease in vocabulary, may have trouble learning and retaining new information, and may have difficulty handling complex tasks, such as balancing a checkbook or cooking a meal. Behavioral changes may include increased irritability, passivity, loss of initiative, and paranoia.

Significant memory loss is *not* a normal part of aging but, instead, is disease-related, the most common form of which is Alzheimer's disease. An estimated 40 percent of people over the age of 80, and 25 percent of those aged 60-75, have Alzheimer's. Alzheimer's is a progressive, fatal illness that is currently incurable. However, medications are available that some doctors believe can slow the process.

The standardized test that is often used to diagnose dementia is the Mini-Mental Status Examination (MMSE). This test is most useful in determining that someone is suffering from dementia, but not in ruling out dementia. This can lead to "false negative" results.

Other forms of incurable dementia include multi-infarct dementia (mini-strokes), Parkinson's disease, Huntington's disease, and Korsokoff's dementia, which is related to

chronic alcoholism. Again, the progression of these dementia-related illnesses can be slowed with early diagnosis and medication.

"Pseudo-dementias" present with the same symptoms as real dementia. These include depression, which—especially in older people—can cause confusion and memory loss, thyroid disorders, vitamin B-12 deficiency, brain tumors, and memory loss and confusion associated with multiple medications. These diseases are usually curable and account for up to 30 percent of people who are experiencing symptoms of dementia.

3. Depression

Depression is a whole-body illness affecting thoughts, feelings, and behaviors, not unlike a "mental flu." Depression affects one to three percent of the population at any given time, and one in 10 people experience major depression over the course of a lifetime. Because depression lowers productivity, affects quality of work, and results in time missed from work, it is the second most costly expenditure for private industry, second only to back problems. Classic signs of depression are insomnia; waking up early in the morning with the mind churning or ruminating; mood disturbance (such as irritability or anxiety, not necessarily sadness); decreased appetite or binge appetite; decreased libido; low energy; feelings of helplessness, shame, or guilt; and inability to experience pleasure or joy.

Depression is treatable, but often goes undiagnosed or, if diagnosed, is treated inadequately. Although a primary care doctor can treat simple depression, if the depression has not lifted after six to eight weeks, a psychiatrist should be consulted. If left untreated, depression lasts, on average, nine months.

Ninety-five percent of depression is treatable. Many anti-depressant medications, including seratonin reuptake inhibiters, tricyclics, and newer drugs such as Wellbutrin, have been found to be very effective in treating depression. These drugs work on the brain's neurotransmitters to "recalibrate" the brain. Although rarely used, electroshock therapy is still the most effective treatment for depression.

4. Stress

Stress is the demand placed on the mind and body in the course of normal affairs. When stress becomes sustained, specific coping mechanisms (cognitive, muscular, vascular, and hormonal) lose their ability to return to normal baseline conditions, and systems begin to perform less and less efficiently (e.g., hypertension leading to a heart attack). Classic signs of stress include isolation, disregarding social needs, and

disregarding the needs of the family. Efficiency and capacity for empathy begin to decrease as isolation, irritability, arrogance, and forgetfulness increase.

Basic prophylactic measures to combat stress include taking three five- to tenminute breaks per day in which no phone calls are made and no notes are taken; taking 15 minutes to do something for yourself at the end of each day; and, when at home, exchanging with a spouse or other friend or family member how the day went. Fostering collegial friendships at work also is helpful.

Appendix H

Medical Certificate: Certificate of Disability

This medical certificate should be used when a bankruptcy judge or magistrate judge seeks to retire as disabled or when a senior Article III judge certifies himself or herself as disabled under 28 U.S.C. § 371(f)(1)(E). The medical certificate will assist the chief judge of the circuit, or relevant chief judge, in determining whether to certify the judge as disabled. (See Appendix B for model certificates of disability). The medical certificate should be completed by the judge's physician and should be submitted to the chief judge of the circuit (in the case of a disabled bankruptcy judge), the relevant chief district judge (in the case of a disabled magistrate judge), or the chief circuit judge (in the case of a senior Article III judge). The attached waiver of the physician-patient privilege should accompany the medical certificate.

If the medical certificate is being submitted in connection with a certification of **temporary** disability under 28 U.S.C. § 371(f)(1)(E), the certificate and waiver should be revised accordingly.

MEDICAL CERTIFICATE

JUDGE'S NAME AND TITLE:	
JUDGE'S CERTIFICATION THAT HE DISABLED FROM PERFORMING TH OFFICE. DESCRIBE THE MEDICAL CONCLUSION THAT THE JUDGE IS	E DUTIES OF HIS OR HER JUDICIAL FACTS THAT SUPPORT YOUR
Signature of Physician	Date
Physician's Name, Address, and Telephone	Number (please type or print clearly)

89

Attachment to Medical Certificate: Certificate of Disability

QUALIFICATIONS

- 1. Able to sit for several hours a day (with the opportunity to stand and stretch at regular intervals).
- 2. Able to travel regularly to work that is likely to be assigned.
- 3. Able to see, hear, or otherwise perceive legal proceedings.
- 4. Able to perform executive functions and make decisions regarding priorities.
- 5. Appropriate cognitive grasp of complex issues.
- 6. Appropriate and reasonable emotional sensitivity to complex issues.
- 7. Able to assign tasks to subordinates and to supervise their work.
- 8. Able to work appropriately with others.
- 9. Adequate short-term and long-term memory to perform duties requiring the ability to recall.
- 10. Able to concentrate for extended periods of time on legal and factual issues.

Waiver of Physician-Patient Privilege (Medical Certificate: Certificate of Disability)

[FOR USE BY BANKRUPTCY JUDGES WHO ARE RETIRING AS DISABLED AND SENIOR ARTICLE III JUDGES WHO ARE CERTIFYING THEMSELVES AS DISABLED UNDER 28 U.S.C. § 371(f)(1)(E).]

DISABLED UNDER 28 U.,	S.C. § 3/1(1)(1)(E).]
I,	, hereby waive the physician-patient privilege existing
between my physician,	, and me, as it relates to my claimed
disability. By waiving the p	physician-patient privilege, I authorize my physician to discuss
with the Chief Judge of the	Ninth Circuit (Chief Judge), or his or her designee, all matters
regarding my physical or me	ental condition that my physician has learned in connection
with his or her diagnosis tha	at I am temporarily or permanently disabled.
I further authorize my	y physician to furnish to the Chief Judge, or his or her designee
all records regarding my phy	ysical or mental condition pertaining to my claimed disability
that are in his or her possess	sion or control. I also authorize my physician to complete the
attached Medical Certificate	e. The Medical Certificate is being furnished in connection
with my request for certifica	ation that I am permanently disabled from performing the duties
of my judicial office.	
This authorization sh	all remain valid unless revoked in writing.
Signature of Patient-Judge	Date

Waiver of Physician-Patient Privilege (Medical Certificate: Certificate of Disability)

[FOR USE BY MAGISTRATE JUDGES WHO ARE RETIRING AS DISABLED.]

I,	, hereby waive the physician-pa	atient privilege existing
between my physician,	, and me, as it re	lates to my claimed
disability. By waiving the physici	ian-patient privilege, I authorize r	ny physician to discuss
with the Chief Judge of the United	d States District Court for the	District of
(Chief Judge), or his o	or her designee, all matters regard	ing my physical or
mental condition that my physicia	n has learned in connection with	his or her diagnosis that
I am temporarily or permanently d	disabled.	
I further authorize my phys	sician to furnish to the Chief Judg	e, or his or her designee,
all records regarding my physical	or mental condition pertaining to	my claimed disability
that are in his or her possession or	control. I also authorize my phy	sician to complete the
attached Medical Certificate. The	Medical Certificate is being furn	ished in connection
with my request for certification the	hat I am permanently disabled fro	m performing the duties
of my judicial office.		
This authorization shall ren	nain valid unless revoked in writi	ng.
Signature of Patient-Judge		Date

Appendix I

Medical Certificate: Designation of Senior Article III Judge

This certificate should be completed by the judge's physician when (1) an Article III judge who has retired as disabled is designated for service within the circuit, or (2) a senior Article III judge who has certified himself or herself as disabled under 28 U.S.C. § 371(f)(1)(E) wishes to continue to be designated for duty. The attached waiver of the physician-patient privilege should accompany this certificate.

MEDICAL CERTIFICATE

JUDGE'S NAME:	
THE JUDGE LISTED ABOVE RETIRED AS DISABLED ON TO (list disabling condition). THIS MEDICAL CERTIFICATE IS BEING PROVIDED IN SUPPORT OF THE JUD DESIGNATION TO CONTINUE TO PERFORM JUDICIAL DUTIL	GE'S
IN YOUR MEDICAL OPINION, DOES THE JUDGE MEET THE QUALIFICATIONS DETAILED ON THE ATTACHED SHEET? Yes No	
IF NO, PLEASE EXPLAIN:	
Signature of Physician Date	
Name, Address, and Telephone Number of Physician (please type or print of	clearly)

Attachment to Medical Certification: Designation of Senior Article III Judge

QUALIFICATIONS

- 1. Able to sit for several hours a day (with the opportunity to stand and stretch at regular intervals).
- 2. Able to travel regularly to work that is likely to be assigned.
- 3. Able to see, hear, or otherwise perceive legal proceedings.
- 4. Able to perform executive functions and make decisions regarding priorities.
- 5. Appropriate cognitive grasp of complex issues.
- 6. Appropriate and reasonable emotional sensitivity to complex issues.
- 7. Able to assign tasks to subordinates and to supervise their work.
- 8. Able to work appropriately with others.
- 9. Adequate short-term and long-term memory to perform duties requiring the ability to recall.
- 10. Able to concentrate for extended periods of time on legal and factual issues.

Waiver of Physician-Patient Privilege (Medical Certificate: Designation of Senior Article III Judge)

I,	, hereby waive the physician-patient privilege existing
between my physician,	, and me, as it relates to my claimed
disability. By waiving the physi	cian-patient privilege, I authorize my physician to discuss
with the Chief Judge of the Nint	h Circuit (Chief Judge), or his or her designee, all matters
regarding my physical or mental	condition that my physician has learned in connection
with his or her diagnosis that I as	m temporarily or permanently disabled.
I further authorize my phy	ysician to furnish to the Chief Judge, or his or her designee
all records regarding my physica	l or mental condition pertaining to my claimed disability
that are in his or her possession of	or control. I also authorize my physician to complete the
attached Medical Certificate. Th	ne Medical Certificate is being furnished in connection
with my request to be designated	I, or continue to be designated, for duty as a senior judge.
This authorization shall re	emain valid unless revoked in writing.
Signature of Patient-Judge	Date

Appendix J

Medical Certificate: Recall of Disabled Bankruptcy Judge or Magistrate Judge

This certificate should be completed by the judge's physician when a bankruptcy judge or magistrate judge, who has retired as disabled, is recalled for service. The attached waiver of the physician-patient privilege should accompany this certificate.

MEDICAL CERTIFICATE

JUDGE'S NAME:	
THE JUDGE LISTED ABOVE RETIRED AS DISABLED ON	
Signature of Physician Date	
Name, Address, and Telephone Number of Physician (please type or print clearly)

Attachment to Medical Certification: Recall of Disabled Bankruptcy Judge or Magistrate Judge

QUALIFICATIONS

- 1. Able to sit for several hours a day (with the opportunity to stand and stretch at regular intervals).
- 2. Able to travel regularly to work that is likely to be assigned.
- 3. Able to see, hear, or otherwise perceive legal proceedings.
- 4. Able to perform executive functions and make decisions regarding priorities.
- 5. Appropriate cognitive grasp of complex issues.
- 6. Appropriate and reasonable emotional sensitivity to complex issues.
- 7. Able to assign tasks to subordinates and to supervise their work.
- 8. Able to work appropriately with others.
- 9. Adequate short-term and long-term memory to perform duties requiring the ability to recall.
- 10. Able to concentrate for extended periods of time on legal and factual issues.

Waiver of Physician-Patient Privilege (Medical Certificate: Recall of Disabled Bankruptcy Judge or Magistrate Judge)

I,	, hereby waive the physician-patient privilege existing
between my physician,	, and me, as it relates to my claimed
disability. By waiving the p	hysician-patient privilege, I authorize my physician to discuss
with the Chief Judge of the I	Ninth Circuit (Chief Judge), or his or her designee, all matters
regarding my physical or me	ental condition that my physician has learned in connection
with his or her diagnosis that	t I am temporarily or permanently disabled.
I further authorize my	physician to furnish to the Chief Judge, or his or her designee,
all records regarding my phy	sical or mental condition pertaining to my claimed disability
that are in his or her possess	ion or control. I also authorize my physician to complete the
attached Medical Certificate	. The Medical Certificate is being furnished in connection
with my request to perform j	udicial duties as a recalled bankruptcy judge or magistrate
judge.	
This authorization sha	all remain valid unless revoked in writing.
Signature of Patient-Judge	Date



LEONIDAS RALPH MECHAM Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

CLARENCE A. LEE, JR. Associate Director WASHINGTON, D.C. 20544 June 24, 1999

WILLIAM R. BURCHILL, JR. Associate Director and General Counsel

Honorable Judith N. Keep United States District Court 5190 Edward J. Schwartz United States Courthouse 940 Front Street San Diego, CA 92101-8906

Dear Judge Keep:

I am writing in furtherance of our recent telephone conversations regarding procedures for approving a judge's application for disability retirement under 28 U.S.C. § 372(a). In your capacity as chair of the Ninth Circuit's disability committee, you ask if the chief judge of the circuit may require that a judge's application be accompanied by a medical certificate from a doctor. We believe the answer to that question is yes.

As you are aware, section 372(a) provides that a circuit or district judge "who becomes permanently disabled from performing his duties" may retire on the basis of such disability. To effectuate this form of retirement, a judge "shall furnish to the President a certificate of disability signed by the chief judge of his circuit."

We must assume that a chief judge's signature on an applicant-judge's certificate of disability is not an empty formality but is instead intended to serve a legal purpose, and that such purpose is to convey the chief judge's concurrence in the applicant's claim of being disabled from performing the duties of the judicial office. For such concurrence to be knowing, a chief judge may of course require information, and there can be no more appropriate or logical piece of information to request than a medical certificate. The exact form of such a certificate, the amount of detail to be conveyed, and related matters are, in our view, appropriate for determination by a chief judge in his or her discretion.

In sum, we are of the view that a circuit chief judge may, as a condition of providing his or her concurrence upon a judge's application for disability retirement, require the applicant-judge to provide supporting medical information in such form and in such detail as the chief judge determines is appropriate.

A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY

Honorable Judith N. Keep Page 2

I hope you find this responsive. If you require any further information, please do not hesitate to contact me.

Sincerely, L Corretter

Robert K. Loesche Deputy General Counsel



LEONIDAS RALPH MECHAM Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

CLARENCE A. LEE, JR. Associate Director

WASHINGTON, D.C. 20544 January 6, 2000

WILLIAM R. BURCHILL, JR. Associate Director and General Counsel

Honorable Judith N. Keep United States District Court 5190 Edward J. Schwartz United States Courthouse 940 Front Street San Diego, CA 92101-8906

Dear Judge Keep:

I am writing in response to a letter dated November 10, 1999, from Julie Cobb Martel, Legal Affairs Staff Attorney for the Office of the Circuit Executive for the United States Courts for the Ninth Circuit, requesting the opinion of this office regarding procedures for designating a judge who has retired from regular active service under 28 U.S.C. § 372(a) to perform judicial duties as a senior judge pursuant to 28 U.S.C. § 294(b). Specifically, Ms. Martel inquired "whether the chief judge or judicial council may request and/or require as part of the designation process that a judge who has retired as disabled under 28 U.S.C. § 372(a) submit medical information demonstrating that he or she is medically 'able' to perform those duties. The statute does not expressly address this issue." Ms. Martel asked that our response be directed to you in your capacity as Chair of the Judicial Disability Task Force of the Judicial Council of the Ninth Circuit.

As you are aware, section 294(b) provides that a judge who has retired from regular active service under either section 372(a) or section 371(b) (the "Rule of 80" provision) "may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d)." Section 294(c), in turn, states, "Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake." As Ms. Martel points out, the statute does not address the question of what procedures the chief judge or judicial council may opt to follow in determining whether or not to designate or assign a senior judge under these provisions.

Honorable Judith N. Keep Page 2

I start with the premise that the statute's requirement that the chief judge or circuit council affirmatively designate a senior judge to sit is not an empty formality. The statute means to confer upon the chief judge or circuit council the authority to decide whether or not a senior judge will sit, and contains no language that could be read to cabin their discretion in this regard. The statute, in addition, specifically provides that a senior judge may be designated to perform such duties as he or she is "able" to undertake. Accordingly, it is our view that the chief judge or circuit council may decline to designate a senior judge if they determine, based on such information as is available to them, that the senior judge is not physically and/or mentally "able" to undertake judicial duties.

The grant of such authority implicitly assumes that the chief judge or circuit council will thereby be interested in knowing or determining whether or not a particular senior judge may be deemed fit to sit. It follows that if the chief judge or circuit council has some doubt about a senior judge's physical and/or mental fitness, the senior judge may be asked to furnish information relevant to that question as part of the designation process. There will ordinarily be no more appropriate or logical piece of information to request than a medical certificate. The exact nature of the medical information requested, the amount of detail to be conveyed, and related matters are, in our view, appropriate for determination by a chief judge or circuit council in their discretion.

The senior judge would not, of course, be under any compulsion to provide requested medical information should he or she not wish to do so. The senior judge will understand, however, that if he or she declines to provide requested medical information, the chief judge or circuit council may decline to designate that judge to sit on the basis of such information as they may possess concerning the judge's fitness to serve.

These conclusions are even more clear, in our view, in the case of a senior judge who has retired on disability under section 372(a). In order to retire under that section, the senior judge already has certified to the President that he or she has become "permanently disabled from performing his duties," i.e., from performing the ordinary range of judicial duties. This certification naturally and obviously creates an issue, should the judge later seek to be designated to sit, whether or not the judge is fit to undertake any judicial duties at all. It is therefore not only permissible but eminently reasonable for the chief judge or circuit council to require the senior judge to submit medical information as a precondition to designation.

The Judicial Conference of the United States has never issued any regulations or model procedures intended to guide chief judges and circuit councils in exercising their responsibilities in the designation and assignment of senior judges. I should mention, however, that the Conference did take action at its March 1996 session, based on a recommendation from its Committee on the Judicial Branch, regarding issues related to the question you have raised. The Conference proceedings report that action as follows:

Honorable Judith N. Keep Page 3

"A 1964 resolution of the Judicial Conference provides that 'semor judges should be designated to sit in their own districts for periods not longer than a year at a time by each designation, except under exceptional oricumstances.' JCUS-SEP 64, p. 59. On recommendation of the Committee on the Judicial Branch, the Judicial Conference repealed the 1964 resolution and, in lieu of the policy expressed by the resolution, determined that the discipline of senior judges and proceedings concerning disability or inability to perform judicial duties should be inquired into and resolved pursuant to authority of 28 U.S.C. § 372."

JCUS-MAR 96, p. 23.

The Report submitted to the March 1996 Judicial Conference by the Committee on the Judicial Branch contained the following explanation for this recommendation of the Committee:

"It is the sense of the Committee that the 1964 resolution of the Conference [that senior judges should be designated on an annual basis] is obsolete and should be repealed. The Committee believes that the annual designation process $\underline{\text{may}}$ be used to deny a senior judge designation without any due process. This conclusion alone justifies the repeal of this mechanism.

The Committee understands that there is no history of the power to designate and assign being misused or employed coercively to retaliate against judges for the nature of their decisions. Indeed, one member opined that the 1964 resolution provides flexibility to serve both the senior judges individually and the needs of the judiciary. A chief circuit judge or judicial council may at times wish to discontinue a senior judge's performance of duties either temporarily or permanently without the formality of requiring that a complaint be filed against the judge and that it be investigated with the resulting corrective action announced in a public order. However, the ease of the designation process comes at the expense of a senior judge's due process rights."

Report at 3-4.

In my view, this Judicial Conference action, determining that "proceedings concerning disability or inability to perform judicial duties should be inquired into and resolved pursuant to authority of 28 U.S.C. § 372," does not apply to the issue you have posed. The Conference was addressing the procedures by which the chief judge or circuit council may revoke the designation of an already-designated senior judge. Your question, by contrast, concerns the procedures by which a chief judge or circuit council may determine whether or not to designate a senior judge in the first place.

Page 4 Honorable Judith N. Keep

disabled from performing a full range of judicial duties. active service under section 372(a), has already acknowledged that he or she is permanently threaten those rights, especially in the case of a senior judge who, by retiring from regular designation process. I cannot imagine that a request for relevant medical information would council to determine how best to protect the due process rights of senior judges in the judge's due process rights will always apply. It is, of course, for the chief judge or circuit Needless to say, the Conference's underlying concern about safeguarding a senior

judge or circuit council deems appropriate. senior judge to provide supporting medical information in such form and detail as the chief condition of agreeing to designate a senior judge to sit pursuant to section 294(b), require the In sum, we hold the view that a circuit chief judge or circuit council may, as a

hesitate to contact me. I hope you find this responsive. If you require any further information, please do not

ffréy N. Barr

Assistant General Counsel

Julie Cobb Martel, Esq.



LEONIDAS RALPH MECHAM Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

CLARENCE A. LEE, JR. Associate Director

WASHINGTON, D.C. 20544 March 6, 2000

WILLIAM R. BURCHILL, JR. Associate Director and General Counsel

Julie Cobb Martel, Esq.
Office of the Circuit Executive
95 Seventh Street
Post Office Box 193939
San Francisco, CA 94119-3939

Dear Ms. Martel:

I am writing in response to your letter dated January 6, 2000, in which you have requested, on behalf of the Judicial Disability Task Force of the Ninth Circuit Judicial Council, the opinion of this office regarding procedures for the recall of retired bankruptcy judges and retired magistrate judges. Specifically, you have asked whether a bankruptcy judge or magistrate judge who retired as disabled is eligible for recall, assuming the judge is willing and able to serve. You also have asked whether, in that situation, the judicial council may request or require, as part of the recall process, that a judge who retired as disabled submit medical information demonstrating that he or she is medically able to perform the duties of the position.

Eligibility for Recall of Judges who Retired as Disabled

As you noted in your letter, the statutes providing for recall of bankruptcy judges and magistrate judges, 28 U.S.C. §§ 155(b) and 636(h), respectively, both state only that a bankruptcy judge or a magistrate judge "who has retired" may, upon consent, be recalled. Neither statute contains any language indicating that a bankruptcy judge or a magistrate judge who retired as disabled cannot be recalled.

Under governing Judicial Conference regulations, there are two authorized categories of recall of bankruptcy judges and magistrate judges: "ad hoc" recall, under which a judicial council may recall a retired bankruptcy judge or a retired magistrate judge for a fixed period not to exceed a year and a day, and "extended service" recall, under which a judicial council may recall a retired bankruptcy judge or a retired magistrate judge for a fixed period of more than one year but not more than three years. The Judicial Conference regulations that govern ad hoc recall – the Regulations of the Judicial Conference of the United States Governing the Ad Hoc Recall of Retired Bankruptcy Judges, <u>Guide to Judiciary Policies and Procedures</u>, Vol. III, Sec. B, Ch. VII, Exhibit A, and the Regulations of the Judicial Conference of the

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United States Establishing Standards and Procedures for the Recall of United States Magistrate Judges, <u>Guide</u>, Vol. III, Sec. B, Ch. VIII, Exhibit A – permit the recall of all retired bankruptcy judges or retired magistrate judges, without regard to the type of retirement taken. These regulations contain nothing to suggest that a bankruptcy judge or a magistrate judge who had taken disability retirement would thereby be precluded from recall.

retirement that the judge's number of years of service (between 10 and 14) bears to 14. years, in an amount equal to that proportion of the salary received by the judge at the time of salary received at the time of retirement or, in the case of a judge who has served at least 10 for at least five years, with the judge to receive an annuity in the amount of 40 percent of the disability retirement for a bankruptcy judge or a magistrate judge of any age who has served judge or magistrate judge] leaves office " 28 U.S.C. § 377(d), in turn, provides for entitled to receive an annuity equal to the full salary of the office at the time the [bankruptcy section 377 of title 28, United States Code, or section 2(c) of Public Law 100-659, and who is magistrate judge "who is at least 65 years of age, who has retired under the provisions of extended service recall. These regulations restrict eligibility to a bankruptcy judge or a B - do restrict the eligibility of retired bankruptcy judges and retired magistrate judges for Recall of Retired United States Magistrate Judges, Guide, Vol. III, Sec. B, Ch. VIII, Exhibit Regulations of the Judicial Conference of the United States Governing the Extended Service Recall of Retired Bankruptcy Judges, Guide, Vol. III, Sec. B, Ch. VII, Exhibit B, and the Regulations of the Judicial Conference of the United States Governing the Extended Service However, the Judicial Conference regulations that govern extended service recall - the

Under section 377(d), therefore, most bankruptcy judges and magistrate judges who retire as disabled will <u>not</u> be entitled to receive an annuity equal to the full salary of the office at the time they retire. Thus, they will not later be eligible for extended service recall under the Judicial Conference regulations (although they will be eligible for ad hoc recall, if they are otherwise qualified). In addition, some bankruptcy judges and magistrate judges who have retired as disabled will be under 65 years of age, and for that reason also will not be eligible for extended service recall (although they will be eligible for ad hoc recall, for which there is no age requirement).

Authority to Request or Require Medical Information

In discussing the recall of retired bankruptcy judges, the <u>Guide</u> states, "There is no absolute right for a bankruptcy judge to be recalled under 28 U.S.C. § 155(b) or the Conference's regulations. . . . The decision to recall a bankruptcy judge is left to the discretion of the judicial council of the circuit." <u>Guide</u>, Vol. III, Sec. B, Ch. VII, at 2. Although the parallel discussion in the <u>Guide</u> regarding recall of retired magistrate judges does not happen to contain a similar statement, <u>Guide</u>, Vol. III, Sec. B, Ch. VIII, the Judicial Conference regulations governing ad hoc recall of retired magistrate judges state that "[t]o be

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eligible for recall, a retired magistrate judge must . . . (2) be competent to perform duties in accordance with § 631(b)(2) " <u>Guide</u>, Vol. III, Sec. B, Ch. VIII, Exhibit A, § 1(b).

In addition, the extended-service regulations governing retired bankruptcy judges state, "A retired bankruptcy judge may agree to be recalled for extended service under these regulations only upon certification, by the judicial council of the circuit in which the official duty station of the judge will be located, that substantial service is expected to be performed by such judge during the period of extended service." Guide, Vol. III, Sec. B, Ch. VII, Exhibit B, § 2. Similarly, the extended-service regulations governing retired magistrate judges an extended service basis shall certify that the magistrate judge is expected to perform an extended service during the period of recall." Guide, Vol. III, Sec. B, Ch. VIII, Exhibit B, § 4(a).

Taken together, all of these provisions make clear that no retired bankruptcy judge or retired magistrate judge has any entitlement to be recalled. The recall decision is instead a matter entirely within the discretion (subject, of course, to applicable Judicial Conference regulations) of the recalling authorities, i.e., the judicial council plus, in the case of a magistrate judge, the applicable district court. There is no language in the above-cited Judicial Conference regulations that could be read to cabin the discretion of the recalling authorities in any relevant regard. It follows that the recalling authorities of course may decline to recall a retired bankruptcy judge or a retired magistrate judge if they do not believe that the retired judge will be capable of performing the duties envisioned.

The grant of such authority to the recalling authorities (the judicial council and/or the district court) implicitly assumes that those authorities will thereby be interested in knowing or determining whether or not a retired bankruptcy judge or a retired magistrate judge who has requested recall will be capable of performing the required duties. If, therefore, the recalling authorities have some doubt about a retired judge's physical and/or mental fitness, the retired judge may be asked to furnish information relevant to that question as part of the recall process. The exact nature of the medical information requested, the amount of detail to be conveyed, and related matters are, in our view, appropriate for determination by the recalling authorities in their discretion.

These conclusions are buttressed by the provisions in the Judicial Conference regulations governing recall of bankruptcy judges which state, in the context of service by a recalled bankruptcy judge in another circuit, "The chief judge of a court of appeals shall be entitled to full access to all pertinent information concerning a retired bankruptcy judge who served in a different circuit" <u>Guide</u>, Vol. III, Sec. B, Ch. VII, Exhibit A, § 6; <u>Guide</u>, Vol. III, Sec. B, Ch. VII, Exhibit B, § 9. I would argue that by recognizing the interest of the chief judge of another circuit in all pertinent information concerning a retired bankruptcy judge who may be pressed into service, the Judicial Conference regulations implicitly

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recognize the interest of the judicial council of the original circuit in all pertinent information concerning a retired bankruptcy judge who may be recalled.

These conclusions apply to any retired judge who seeks recall, but they are especially clear, in my view, in the case of a judge who retired on disability. The fact of disability retirement naturally and obviously creates an issue, should the judge later seek to be recalled, whether or not the judge is fit to undertake the required judicial duties.

The retired bankruptcy judge or retired magistrate judge would not, of course, be under any compulsion to provide requested medical information should he or she not wish to do so. The retired judge will understand, however, that the judicial council need not proceed with the recall if it is not satisfied that the judge will be fit to serve.

I hope that you will find this helpful. Please let me know if I may assist you further.

Jeffrey N. Barr

Assistant General Counsel

Appendix L

Excerpts of Statutes

28 U.S.C. § 152(e)

A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal. Before any order of removal may be entered, a full specification of charges shall be furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such charges.

28 U.S.C. § 155(b)

A bankruptcy judge who has retired may, upon consent, be recalled to serve as a bankruptcy judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a bankruptcy judge may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference of the United States, subject to the restrictions on the payment of an annuity in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such judge.

28 U.S.C. § 294(b)

Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

28 U.S.C. § 294(c)

Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

28 U.S.C. § 294(d)

The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

28 U.S.C. § 371(a)

Any Justice or judge of the United States appointed to hold office during good behavior may retire form the office after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) and shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.

28 U.S.C. § 371(b)

- (1) Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements of subsection (f).
- (2) In a case in which a justice or judge who retires under paragraph (1) does not meet the requirements of subsection (f), the justice or judge shall continue to receive the salary that he or she was receiving when he or she was last in active service or, if a certification under subsection (f) was made for such justice or judge, when such certification was last in effect. The salary of such justice or judge shall be adjusted under section 461 of this title.

28 U.S.C. § 371(c)

The age and service requirements for retirement under this section are as follows:

Attained age:	Years of service:
65	15
66	14
67	13

68	12
69	11
70	10

28 U.S.C. § 371(f)

- (1) In order to continue receiving the salary of the office under subsection (b), a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements set forth in at least one of the following subparagraphs:
- (A) The justice or judge must have carried in the preceding calendar year a caseload involving courtroom participation which is equal to or greater than the amount of work involving courtroom participation which an average judge in active service would perform in three months. In the instance of a justice or judge who has sat on both district courts and courts of appeals, the caseload of appellate work and trial work shall be determined separately and the results of those determinations added together for purposes of this paragraph.
- (B) The justice or judge performed in the preceding calendar year substantial judicial duties not involving courtroom participation under subparagraph (A), including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is assigned. Any certification under this subparagraph shall include a statement describing in detail the nature and amount of work and certifying that the work done is equal to or greater than the work described in this subparagraph which an average judge in active service would perform in three months.
- (C) The justice or judge has, in the preceding calendar year, performed work described in subparagraphs (A) and (B) in an amount which, when calculated in accordance with such subparagraphs, in the aggregate equals at least 3 months work.
- (D) The justice or judge has, in the preceding calendar year, performed substantial administrative duties directly related to the operation of the courts, or has performed substantial duties for a Federal or State governmental entity. A certification under this subparagraph shall specify that the work done is equal to the full-time work of an employee of the

judicial branch. In any year in which a justice or judge performs work described under this subparagraph for less than the full year, one-half of such work may be aggregated with work described under subparagraph (A), (B), or (C) of this paragraph for the purpose of the justice or judge satisfying the requirements of such subparagraph.

- (E) The justice or judge was unable in the preceding calendar year to perform judicial or administrative work to the extent required by any of subparagraphs (A) through (D) because of a temporary or permanent disability. A certification under this subparagraph shall be made to a justice who certifies in writing his or her disability to the Chief Justice, and to a judge who certifies in writing his or her disability to the chief judge of the circuit in which the judge sits. A justice or judge who is certified under this subparagraph as having a permanent disability shall be deemed to have met the requirements of this subsection for each calendar year thereafter.
- (2) Determinations of work performed under subparagraphs (A), (B), (C), and (D) of paragraph (1) shall be made pursuant to rules promulgated by the Judicial Conference of the United States. In promulgating such criteria, the Judicial Conference shall take into account existing standards promulgated by the Conference for allocation of space and staff for senior judges.
- (3) If in any year a justice or judge who retires under subsection (b) does not receive a certification under this subsection (except as provided in paragraph (1)(E)), he or she may thereafter receive a certification for that year by satisfying the requirements of subparagraph (A), (B), (C), or (D) of paragraph (1) of this subsection in a subsequent year and attributing a sufficient part of the work performed in such subsequent year to the earlier year so that the work so attributed, when added to the work performed during such earlier year, satisfies the requirements for certification for that year. However, a justice or judge may not receive credit for the same work for purposes of certification for more than 1 year.
- (4) In the case of any justice or judge who retires under subsection (b) during a calendar year, there shall be included in the determination under this subsection of work performed during that calendar year all work performed by that justice or judge (as described in subparagraphs (A), (B), (C), and (D) of paragraph (1)) during that calendar year before such retirement.

28 U.S.C. § 372

(a) Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

Any justice or judge of the United States desiring to retire under this section shall certify to the President his disability in writing.

Whenever an associate justice of the Supreme Court, a chief judge of a circuit or the chief judge of the Court of International Trade, desires to retire under this section, he shall furnish to the President a certificate of disability signed by the Chief Justice of the United States.

A circuit or district judge, desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his circuit.

A judge of the Court of International Trade desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his court.

Each justice or judge retiring under this section after serving ten years continuously or otherwise shall, during the remainder of his lifetime, receive the salary of the office. A justice or judge retiring under this section who has served less than ten years in all shall, during the remainder of his lifetime, receive one-half the salary of the office.

- (b) Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit in the case of a circuit or district judge, or by the Chief Justice of the United States in the case of the Chief Judge of the Court of International Trade, or by the chief judge of his court in the case of a judge of the Court of International Trade, is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled. Any judge whose disability causes the appointment of an additional judge shall, for purpose of precedence, service as chief judge, or temporary performance of the duties of that office, be treated as junior in commission to the other judges of the circuit, district, or court.
- (c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor,

identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

- (2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.
- (3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may--
- (A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or
- (B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

- (4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--
- (A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;
- (B) certify the complaint and any other documents pertaining thereto to each member of such committee; and
- (C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

A judge appointed to a special committee under this paragraph may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371(a) of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit

or district judge, as the case may be, to the committee.

- (5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.
- (6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council--
- (A) may conduct any additional investigation which it considers to be necessary;
- (B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:
- (i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;
- (ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;
- (iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;
- (iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;
- (v) censuring or reprimanding such judge or magistrate by means of private communication;
- (vi) censuring or reprimanding such judge or magistrate by means of public announcement; or
- (vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this

title;

- (C) may dismiss the complaint; and
- (D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.
- (7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.
- (B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior may have engaged in conduct--
- (i) which might constitute one or more grounds for impeachment under article II of the Constitution; or
- (ii) which, in the interest of justice, is not amenable to resolution by the judicial council,
- the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.
- (C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.
- (8)(A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

- (B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.
- (9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.
- (B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.
- (10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.
- (11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that--
- (A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;
- (B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and
- (C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant

could offer substantial information.

Any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this subsection may limit the period of time within which a person may file a complaint under this subsection.

- (12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.
- (13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.
- (14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that--
- (A) the judicial council of the circuit in its discretion releases a copy of a report of a special investigative committee under paragraph (5) to the complainant whose complaint initiated the investigation by that special committee and to the judge or magistrate whose conduct is the subject of the complaint;
- (B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution,

releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

- (C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.
- (15) Each written order to implement any action under paragraph (6) (B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals

for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

- (16) Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.
- (17) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.
- (18) The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

28 U.S.C. § 375

- (a)(1) A bankruptcy judge or a United States magistrate appointed under chapter 43 of this title, who has retired under the provisions of section 377 of this title or under the applicable provisions of title 5 upon attaining the age and years of service requirements established in section 371(c) of this title, may agree to be recalled to serve under this section for a period of five years as a bankruptcy judge or magistrate, as the case may be, upon certification that substantial service is expected to be performed by such retired judge or magistrate during such 5-year period. With the agreement of the judge or magistrate involved, a certification under this subsection may be renewed for successive 5-year periods.
- (2) For purposes of paragraph (1) of this subsection, a certification may be made, in the case of a bankruptcy judge or a United States magistrate, by the judicial council of the circuit in which the official duty station of the judge or magistrate at the time of retirement was located.
- (3) For purposes of this section, the term "bankruptcy judge" means a bankruptcy judge appointed under chapter 6 of this title or serving as a bankruptcy judge on March 31,

1984.

- (b) A judge or magistrate recalled under this section may exercise all of the powers and duties of the office of judge or magistrate held at the time of retirement, including the ability to serve in any other judicial district to the extent applicable, but may not engage in the practice of law or engage in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of duties as a judicial officer.
- (c) During the 5-year period in which a certification under subsection (a) is in effect, the judge or magistrate involved shall receive, in addition to the annuity provided under the provisions of section 377 of this title or under the applicable provisions of title 5, an amount equal to the difference between that annuity and the current salary of the office to which the judge or magistrate is recalled. The annuity of a bankruptcy judge or magistrate who completes that 5-year period of service, whose certification is not renewed, and who retired under section 377 of this title shall be equal to the salary in effect, at the end of that 5-year period, for the office from which he or she retired.
- (d) A certification under subsection (a) may be terminated in accordance with section 372(c) of this title, and such a certification shall be terminated upon the death of the recalled judge or magistrate involved.
- (e) Except as provided in subsection (b), nothing in this section shall affect the right of judges or magistrates who retire under the provisions of chapter 83 or chapter 84 of title 5 to serve as reemployed annuitants in accordance with the provisions of title 5. A judge or magistrate to whom this section applies may be recalled under section 155, 636(h), or 797 of this title, as the case may be, other than during a 5-year period in which a certification under subsection (a) is in effect with respect to that judge or magistrate.
- (f) For purposes of determining the years of service requirements in order to be eligible for recall under this section, any service as a bankruptcy judge or a United States magistrate, and any prior service as a referee in bankruptcy or a United States commissioner, may be credited.
- (g) Except as provided in subsection (c), a judge or magistrate recalled under this section who retired under the applicable provisions of title 5 shall be considered to be a reemployed annuitant under chapter 83 or chapter 84, as the case may be, of title 5.
- (h) The Judicial Conference of the United States may promulgate regulations to implement this section.

28 U.S.C. § 377(a)

Retirement based on years of service.—A bankruptcy judge or magistrate to whom this section applies and who retires from office after attaining the age of 65 years and serving at least 14 years, whether continuously or otherwise, as such bankruptcy judge or magistrate shall, subject to subsection (f), be entitled to receive, during the remainder of the judge's or magistrate's lifetime, an annuity equal to the salary being received at the time the judge or magistrate leaves office.

28 U.S.C. § 377(d)

Retirement for disability.--A bankruptcy judge or magistrate to whom this section applies, who has served at least 5 years, whether continuously or otherwise, as such a bankruptcy judge or magistrate, and who retires or is removed from office upon the sole ground of mental or physical disability shall, subject to subsection (f), be entitled to receive, during the remainder of the judge's or magistrate's lifetime, an annuity equal to 40 percent of the salary being received at the time of retirement or removal or, in the case of a judge or magistrate who has served for at least 10 years, an amount equal to that proportion of the salary being received at the time of retirement or removal which the aggregate number of years of service, not to exceed 14, bears to 14.

28 U.S.C. § 377(e)

Cost-of-living adjustments.--A bankruptcy judge or magistrate who is entitled to an annuity under this section is also entitled to a cost-of-living adjustment in such annuity, calculated and payable in the same manner as adjustments under section 8340(b) of title 5, except that any such annuity, as increased under this subsection, may not exceed the salary then payable for the position from which the judge or magistrate retired or was removed.

28 U.S.C. § 377(f)

Election; annuity in lieu of other annuities.--A bankruptcy judge or magistrate shall be entitled to an annuity under this section if the judge or magistrate elects an annuity under this section by notifying the Director of the Administrative Office of the United States Courts. A bankruptcy judge or magistrate who elects to receive an annuity under this section shall not be entitled to receive

- (1) any annuity to which such judge or magistrate would otherwise have been entitled under subchapter III of chapter 83, or under chapter 84 (except for subchapters III and VII), of title 5, for service performed as such a judge or magistrate or otherwise;
- (2) an annuity or salary in senior status or retirement under section 371 or 372 of this title;
- (3) retired pay under section 7447 of the Internal Revenue Code of 1986; or
- (4) retired pay under section 7296 of title 38.

28 U.S.C. § 631(a)

The judges of each United States district court and the district court of the Virgin

Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. In the case of a magistrate appointed by the district court of the Virgin Islands, this chapter shall apply as though the court appointing such magistrate were a United States district court. Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. Where the conference deems it desirable, a magistrate may be designated to serve in one or more districts adjoining the district for which he is appointed. Such a designation shall be made by the concurrence of a majority of the judges of each of the district courts involved and shall specify the duties to be performed by the magistrate in the adjoining district or districts.

28 U.S.C. § 631(b)

No individual may be appointed or reappointed to serve as a magistrate under this chapter unless:

- (1) He has been for at least five years a member in good standing of the bar of the highest court of a State, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States, except that an individual who does not meet the bar membership requirements of this paragraph may be appointed and serve as a part-time magistrate if the appointing court or courts and the conference find that no qualified individual who is a member of the bar is available to serve at a specific location; . . .
- (3) In the case of an individual appointed to serve in a national park, he resides within the exterior boundaries of that park, or at some place reasonably adjacent thereto; . . .

28 U.S.C. §631(d)

Except as otherwise provided in sections 375 and 636(h) of this title, no individual may serve under this chapter after having attained the age of seventy years: Provided, however, That upon a majority vote of all the judges of the appointing court or courts, which is taken upon the magistrate's attaining age seventy and upon each subsequent anniversary thereof, a magistrate who has attained the age of seventy years may continue to serve and may be reappointed under this chapter.

28 U.S.C. § 631(e)

The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate shall be for a term of four years, except that the term of a full-time or part-time

magistrate appointed under subsection (k) shall expire upon--

- (1) the expiration of the absent magistrate's term,
- (2) the reinstatement of the absent magistrate in regular service in office as a magistrate,
- (3) the failure of the absent magistrate to make timely application under subsection
- (j) of this section for reinstatement in regular service in office as a magistrate after discharge or release from military service,
- (4) the death or resignation of the absent magistrate, or
- (5) the removal from office of the absent magistrate pursuant to subsection (i) of this section, whichever may first occur.

28 U.S.C. § 631(i)

Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district court for the judicial district in which the magistrate serves; where there is more than one judge of a district court, removal shall not occur unless a majority of all the judges of such court concur in the order of removal; and when there is a tie vote of the judges of the district court on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council. In the case of a magistrate appointed under the third sentence of subsection (a) of this section, removal shall not occur unless a majority of all the judges of the appointing district courts concur in the order of removal; and where there is a tie vote on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council or councils. Before any order or removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council, or councils an opportunity to be heard on the charges.

28 U.S.C. § 636

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate.

The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 361.

Appendix M

Excerpts of Regulations

Code of Conduct for United States Judges, Canon 3B(3)

B. Administrative Responsibilities.

(3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

Code of Conduct for United States Judges, Canon 5

- A. <u>Avocational Activities</u>. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the judge's office or interfere with the performance of the judge's judicial duties.
- B. <u>Civic and Charitable Activities</u>. A judge may participate in civic and a charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
 - (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before the court.
 - (2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.
 - (3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. Financial Activities.

- (1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or other persons likely to come before the court on which the judge serves.
- (2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, active partner, manager, advisor, or employee of any business other than a business closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship calculated according to the civil law system, any other relatives with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.
- (3) A judge should manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification.
- (4) A judge should not solicit or accept anything of value from anyone seeking official action or doing business with the court or other entity served by the judge, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judge may accept a gift as permitted by the Judicial Conference gift regulations. A judge should endeavor to prevent a member of a judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference gift regulations.
- (5) For the purpose of this section, "members of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.
- (6) A judge should report the calculate of the gift, bequest, favor, or loan as required by statute or by the Judicial Conference of the United States.
- (7) A judge is not required by this Code to disclose his or her income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

- (8) Information acquired by a judge in the judge's official capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.
- D. <u>Fiduciary Duties</u>. A judge should not serve as the executor, administrator, trustee, guardian. or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties. "Member of the judge's family" means any relative of a judge by blood, adoption, or marriage or any other person treated by a judge as a member of the judge's family.

As a family fiduciary a judge is subjected to the following restrictions:

- (1) the judge should not serve if it is likely that as fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
- (2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge in his or her personal capacity.
- E. <u>Arbitration</u>. A judge should not act as an arbitrator or mediator or otherwise perform judicial functions in private capacity unless expressly authorized by the law.
- F. <u>Practice of Law</u>. A judge should not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.
- G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by an Act of Congress. A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.
- H. <u>Chamber, Resources, and Staff</u>. A judge should not use judicial chambers, resources, or staff to engage in activities permitted by this Canon, except for uses that are de minimis.

Code of Conduct for United States Judges, Canon 7

A. A judge should not:

- (1) act as a leader or hold any office in a political organization;
- (2) make speeches for a political organization or candidate or publicly endorse or oppose a candidate for public office;
- (3) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.
- B. A judge should resign the judicial office when the judge becomes a candidate either in a primary or in a general election for any office.
- C. A judge should not engage in any other political activity; provided, however, this should not prevent a judge from engaging in the activities described in Canon 4.

Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of the United States Bankruptcy Judges, § 1.01(b)(5)

To be qualified for appointment or reappointment as United States bankruptcy judges, nominees must meet the following standards:

(b) They must (1) possess, and have a reputation for, integrity and good character; (2) possess, and have demonstrated, a commitment to equal justice under the law; (3) possess, and have demonstrated, outstanding legal ability and competence; (4) indicate by their demeanor, character, and personality that they would exhibit judicial temperament if appointed or reappointed; and (5) be of sound physical and mental health sufficient to perform the essential duties of the office.

Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of the United States Magistrate Judges, § 1.01

To be qualified for appointment or reappointment as a United States magistrate judge, nominees must meet the following standards:

(c) They must be competent to perform the duties of the office, of good moral

character, emotionally stable and mature, committed to equal justice under the law, in good health, patient, courteous, and capable of deliberation and decisiveness when required to act on their own reason and judgment.

(e) In the case of an initial appointment, they must not be seventy years of age or older.

Regulations of the Director of the Administrative Office Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrate Judges Act of 1988, § 7.01

- (a) A Judicial officer who has made an election to be covered by the Retirement Act and who has served and made contributions or deposits under section 5 of these regulations for at least five years as a judicial officer, whether continuously or otherwise, shall receive an annuity under this section, if the judicial officer retires or is removed from the office upon the sole ground of mental or physical disability.
- (b) If a judicial officer is removed from office upon the sole ground of mental or physical disability under § 631 of title 28 or § 152 of title 28, a copy of the order shall be sent to the Director.
- (c) If a judicial officer voluntarily leaves office on the sole ground of mental or physical disability, the judicial officer shall certify in writing, in the case of a bankruptcy judge to the chief judge of the circuit court of appeals, or in the case of a magistrate, to the chief judge of the district court, that he or she is permanently disabled from performing the duties of the office and shall submit documentation supporting such a claim. The respective chief judge shall send a copy of the certification, any supporting documentation, and a recommendation regarding the claim of permanent disability of the judicial officer to the director.
 - (1) The Director shall determine the eligibility of a judicial officer for a disability annuity under paragraph (c) of subsection 7.01 of these regulations, in light of the certification, supporting documentation, and the recommendation of the respective chief judge, subject to the review of the Judicial Conference of the United States.
 - (2) The Director may order or direct such medical or other examinations as the Director deems necessary to determine the facts relative to the nature and degree of disability, and may suspend or deny a disability annuity for failure to submit to any such examination.

Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 2(j)

(j) <u>Identification of a Complaint</u>. In the interest of effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint as authorized by 28 U.S.C. § 372(c)(1) and thereby dispense with the filing of a written complaint. A chief judge who has identified a complainant under this rule will not be considered a complainant and, subject to the second sentence of Rule 18 (a), will perform all functions assigned to the chief judge under these rules for the determination of complaints filed by a complainant.

Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 4

- (a) <u>Purpose of the chief judge's review</u>. When a complaint in proper for m is sent to the chief judge by the clerk's office, the chief judge will review the complaint to determine whether it should be
 - (1) dismissed
 - (2) concluded on the ground that correlative action has been taken or that action on the complaint is no longer necessary because of intervening events, or
 - (3) referred to a special committee.
- (b) <u>Inquiry by chief judge</u>. In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, and (2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. Such response will not be made available to the complainant unless authorized by the responding judge. The chief judge may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents.
- (c) Dismissal. A complaint will be dismissed if the chief judge concludes:
 - (1) that the complaint is directly related to the merits of a decision or procedural ruling; or
 - (2) that the claimed conduct, even if the claim is true,
 - (A) is not "conduct prejudicial to the effective and expeditious

administration of the courts," or

- (B) in the case of a disability complaint, does not indicate a mental or physical disability resulting in a inability to discharge the duties of office; or
- (3) that the complaint is frivolous, a term that includes making charges that are wholly unsupported or alleging facts that are shown by a limited inquiry pursuant to Rule 4(b) to be
 - (A) plainly untrue,
 - (B) incapable of being established through investigation, or
 - (C) lacking evidentiary support either
 - (i) to raise an inference that some kind of cognizable misconduct has occurred, or
 - (ii) to warrant further investigation; or
- (4) that, under this statute, the complaint is otherwise not appropriate for consideration.
- (d) <u>Corrective action or intervening events</u>. The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint, that the claimed conduct is an isolated mistake unlikely to be repeated, or that action on the complaint is no longer necessary because of intervening events.
- (e) Appointment of Special Committee. If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee, constituted as provided in Rule 9, to investigate the complaint and make recommendations to the judicial council. However, ordinarily a special committee will not be appointed until the judge complained about has been invited to respond to the complaint and has been allowed a reasonable time to do so. In the discretion of the chief judge, separate complaints may be joined and assigned to a single special committee; similarly, a single complaint about more than one judge may be served and more than one special committee appointed.
- (f) Notice of chief judge's action.
 - (1) If the complaint is dismissed or the proceeding concluded on the basis of corrective action taken, the chief judge will set forth either in the order or in a supporting memorandum the allegations of the complaint and the reasons for the disposition but will not include the name of the

complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2). The complainant will be notified of the right to petition the judicial council for review of the decision and of the deadline for filing a petition.

- (2) If a special committee is appointed, the chief judge will notify the complainant, the judge whose conduct is complained of, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2) that the matter has been referred, and will inform them of the membership of the committee.
- (g) <u>Public availability of chief judge's decision</u>. Materials related to the chief judge's decision will be made public at the time and in the manner set forth in Rule 17.
- (h) <u>Report to judicial council</u>. The chief judge will from time to time report to the judicial council of the circuit on actions taken under this rule.
- (i) <u>Consolidation of complaints</u>. Complaints making similar or related allegations can be consolidated and treated as a single complaint.

Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 10(f)

(f) <u>Voting</u>. All actions of the committee will be by vote of a majority of all of the members of the committee.

Appendix N

Bibliography

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28 U.S.C. § 152

28 U.S.C. § 155

28 U.S.C. § 294

28 U.S.C. § 371

28 U.S.C. § 372

28 U.S.C. § 375

28 U.S.C. § 377

28 U.S.C. § 631

28 U.S.C. § 636

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44 Comp. Gen. 544 (1965) (providing that, because an Article III judge can be removed only through impeachment, a disabled judge who refuses to retire but is forced to do so upon acceptance by the President of a certificate of disability signed by a majority of the members of the Judicial Council of the judge's circuit is entitled to the full salary of the office regardless of length of service).

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6. Formal Presentations to the Task Force

Richard Carlton, Program Director, California Judges' Association Assistance Program, Presentation to Judicial Disability Task Force (Feb. 26, 1999).

Honorable Polly S. Higdon, Chief Bankruptcy Judge (District of Oregon), Presentation to Judicial Disability Task Force (Apr. 16, 1999).

Adrian Hill, Executive Director and Founder of the Canadian Bar Association's Legal Professional Assistance Conference; assisted in developing Canada's Judicial Assistance Program, Presentation to Judicial Disability Task Force (May 20, 1999).

Gail Jara, Executive Director of the California Society of Addiction Medicine, Presentation to Judicial Disability Task Force (Aug. 24, 1999).

Honorable Edward Leavy, Senior Circuit Judge, Ninth Circuit Court of Appeals, Discussion with Judicial Disability Task Force (June 17, 1999).

Donald Muccigrosso, Founder and Former Director of Oregon State Bar's Attorney Assistance Program, Presentation to Judicial Disability Task Force (Apr. 16, 1999).

David Pating, M.D., Psychiatrist and Well-being Committee member, Kaiser Permanente Hospital, Presentation to Judicial Disability Task Force (Aug. 24, 1999).

Honorable John K. Pearson, Bankruptcy Judge (District of Kansas), Discussion with Judge Keep (Spring 1999).

Peter Pompei, M.D., Dementia Specialist and Medical Director of Stanford University Hospital Skilled Nursing Facility, Presentation to Judicial Disability Task Force (May 20, 1999).

John Dillon Riley, Ph.D., Manager, Chevron Employee Assistance Program, Discussion with Judge Walker (Apr. 14, 1999).

Carol Sefren, Administrative Office of the United States Courts, Chief, Judges Compensation and Benefits Branch, Presentation to Judicial Disability Task Force (Apr. 16, 1999).

Alan E. Siegel, General Attorney and Assistant General Counsel for SBC Communications, Inc., Discussion with Judge Walker (Apr. 20, 1999).

S. Alex Stalcup, M.D., Addiction Specialist, Presentation to Judicial Disability Task Force (May 20, 1999).

Tessa ten Tusscher, Ph.D., Clinical Psychologist and Dementia Specialist, Presentation to Judicial Disability Task Force (May 20, 1999).

Janice Thibault, M.F.C.C., Director of the Medical Board of California's Diversion Program Presentation to Judicial Disability Task Force (May 20, 1999).

Justice William Vancise, Court of Appeal for Saskatchewan, Presentation to Judicial Disability Task Force (Aug. 24, 1999).

Isaiah M. Zimmerman, Ph.D., Clinical Psychologist and Judicial Stress Expert, Presentation to Judicial Disability Task Force (May 20, 1999).